# UNIFORM CODE OF MILITARY JUSTICE

# HEARINGS

BEFORE A

## SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES UNITED STATES SENATE

EIGHTY-FIRST CONGRESS

FIRST SESSION

ON

## S. 857 and H. R. 4080

BILLS TO UNIFY, CONSOLIDATE, REVISE, AND CODIFY THE ARTICLES OF WAR, THE ARTICLES FOR THE GOVERNMENT OF THE NAVY, AND THE DISCIPLINARY LAWS OF THE COAST GUARD, AND TO ENACT AND ESTABLISH A UNIFORM CODE OF MILITARY JUSTICE

APRIL 27, MAY 4, 9, AND 27, 1949

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# UNIFORM CODE OF MILITARY JUSTICE

WEDNESDAY, APRIL 27, 1949

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES,
*Washington, D. C.*

The subcommittee met, pursuant to call, at 10 a. m. in the committee room, room 212, Senate Office Building, Senator Estes Kefauver (chairman) presiding.

Present: Senators Kefauver and Saltonstall.

Also present: F. E. Larkin, assistant general counsel to the Secretary of Defense, and Mark H. Galusha, on the staff of the committee.

Senator KEFAUVER. The committee will come to order.

This meeting of a subcommittee of the Armed Services Committee is for the purpose of considering a uniform code of military justice for the armed services. The members of the subcommittee designated by the chairman are: Myself, as chairman, Senator Tydings, Senator Russell, Senator Saltonstall, and Senator Morse.

The departmental bill before this committee is S. 857, and a copy of this bill will be inserted in the record at this point.

(S. 857 is as follows:)

[S. 857, 81st Cong., 1st sess.]

A BILL To unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That a Uniform Code of Military Justice for the government of the armed forces of the United States, unifying, consolidating, revising, and codifying the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, is hereby enacted as follows, and the articles in this section may be cited as "Uniform Code of Military Justice, Article

UNIFORM CODE OF MILITARY JUSTICE



PART I—GENERAL PROVISIONS

ARTICLE 1. Definitions.

The following terms when used in this code shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

(1) "Department" shall be construed to refer, severally, to the Department of the Army, the Department of the Navy, the Department of the Air Force, and, except when the Coast Guard is operating as a part of the Navy, the Treasury Department;

(2) "Armed force" shall be construed to refer, severally, to the Army, the Navy, the Air Force, and, except when operating as a part of the Navy, the Coast Guard;

(3) "Navy" shall be construed to include the Marine Corps and, when operating as a part of the Navy, the Coast Guard;

(4) "The Judge Advocate General" shall be construed to refer, severally, to The Judge Advocates General of the Army, Navy, and Air Force, and except when the Coast Guard is operating as a part of the Navy, the General Counsel of the Treasury Department;

(5) "Officer" shall be construed to refer to a commissioned officer including a commissioned warrant officer;

(6) "Superior officer" shall be construed to refer to an officer superior in rank or command;

(7) "Cadet" shall be construed to refer to a cadet of the United States Military Academy or of the United States Coast Guard Academy;

(8) "Midshipman" shall be construed to refer to a midshipman at the United States Naval Academy and any other midshipman on active duty in the naval service;

(9) "Enlisted person" shall be construed to refer to any person who is serving in an enlisted grade in any armed force;

(10) "Military" shall be construed to refer to any or all of the armed forces;

(11) "Accuser" shall be construed to refer to a person who signs and swears to the charges and to any other person who has an interest other than an official interest in the prosecution of the accused;

(12) "Law officer" shall be construed to refer to an official of a general court-martial detailed in accordance with article 26;

(13) "Law specialist" shall be construed to refer to an officer of the Navy or Coast Guard designated for special duty (law);

(14) "Legal officer" shall be construed to refer to any officer in the Navy or Coast Guard designated to perform legal duties for a command.

ART. 2. Persons subject to the code.

The following persons are subject to this code:

(1) All persons belonging to a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; all volunteers and inductees, from the dates of their muster or acceptance into the armed forces of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty in or for training in, the armed forces, from the dates they are required by the terms of the call, draft, or order to obey the same;

(2) Cadets, aviation cadets, and midshipmen;

(3) Reserve personnel who are voluntarily on inactive duty training authorized by written orders;

(4) Retired personnel of a regular component of the armed forces who are entitled to receive pay;

(5) Retired personnel of a reserve component who are receiving hospital benefits from an armed force;

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve;

(7) All persons in custody of the armed forces serving a sentence imposed by a court-martial;

(8) Personnel of the Coast and Geodetic Survey, Public Health Service, and other organizations, when serving with the armed forces of the United States;

(9) Prisoners of war in custody of the armed forces;

(10) In time of war, all persons serving with or accompanying an armed force in the field;

(11) All persons serving with, employed by, accompanying, or under the supervision of the armed forces without the continental limits of the United States and the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;

(12) All persons within an area leased by the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States and the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

ART. 3. Jurisdiction to try certain personnel.

(a) Reserve personnel of the armed forces who are charged with having committed, while in a status in which they are subject to this code, any offense against this code may be retained in such status or, whether or not such status has terminated, placed in an active-duty status for disciplinary action, without their consent, but not for a longer period of time than may be required for such action.

(b) All persons discharged from the armed forces subsequently charged with having fraudulently obtained said discharge shall be subject to trial by court-martial on said charge and shall be subject to this code while in the custody of the armed forces for such trial. Upon conviction of said charge they shall be subject to trial by court-martial for all offenses under this code committed prior to the fraudulent discharge.

(c) Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of this code by virtue of a separation from any subsequent period of service.

ART. 4. Dismissed officer's right to trial by court-martial.

(a) When any officer, dismissed by order of the President, makes a written application for trial by court-martial, setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try such officer on the charges on which he was dismissed. A court-martial so convened shall have jurisdiction to try the dismissed officer on such charges, and he shall be held to have waived the right to plead any statute of limitations applicable to any offense with which he is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal, but if the court-martial acquits the accused or if the sentence adjudged, as finally approved or affirmed, does not include dismissal or death, the Secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issuance.

(b) If the President fails to convene a general court-martial within six months from the presentation of an application for trial under this article, the Secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issuance.

(c) Where a discharge is substituted for a dismissal under the authority of this article, the President alone may reappoint the officer to such commissioned rank and precedence as in the opinion of the President such former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to position vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and such reappointment shall be considered as actual service for all purposes, including the right to receive pay and allowances.

(d) When an officer is discharged from any armed force by administrative action or is dropped from the rolls by order of the President, there shall not be a right to trial under this article.

ART. 5. Territorial applicability of the code.

This code shall be applicable in all places.

ART. 6. Judge advocates and legal officers.

(a) The assignment for duty of all judge advocates of the Army and Air Force and law specialists of the Navy and Coast Guard shall be subject to the approval of The Judge Advocate General of the armed force of which they are members. The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is authorized to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with The Judge Advocate General.

(c) No person who has acted as member, law officer, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer

in any case shall subsequently act as a staff judge advocate or legal officer to any reviewing authority upon the same case.

PART II—APPREHENSION AND RESTRAINT



ART. 7. Apprehension.

(a) Apprehension is the taking into custody of a person.

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

(c) All officers, warrant officers, petty officers, and noncommissioned officers shall have authority to quell all quarrels, frays, and disorders among persons subject to this code and to apprehend persons subject to this code who take part in the same.

ART. 8. Apprehension of deserters.

It shall be lawful for any civil officer having authority to apprehend offenders under the laws of the United States or of any State, District, Territory, or possession of the United States summarily to apprehend a deserter from the armed forces of the United States and deliver him into the custody of the armed forces of the United States.

ART. 9. Imposition of restraint.

(a) Arrest is the restraint of a person by an order directing him to remain within certain specified limits not imposed as a punishment for an offense. Confinement is the physical restraint of a person.

(b) An enlisted person may be ordered into arrest or confinement by any officer by an order delivered in person or through other persons subject to this code. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted persons of his command or subject to his authority into arrest or confinement.

(c) An officer, a warrant officer, or a civilian subject to this code may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated.

(d) No person shall be ordered into arrest or confinement except for probable cause.

(e) Nothing in this article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

ART. 10. Restraint of persons charged with offenses.

Any person subject to this code charged with an offense under this code shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, such person shall not ordinarily be placed in confinement. When any person subject to this code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

ART. 11. Reports and receiving of prisoners.

(a) No provost marshal, commander of a guard, or master at arms shall refuse to receive or keep any prisoner committed to his charge by an officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after such commitment or as soon as he is relieved from guard, report to the commanding officer the name of such prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

ART. 12. Confinement with enemy prisoners prohibited.

No member of the armed forces of the United States shall be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States.

ART. 13. Punishment prohibited before trial.

Subject to the provisions of article 57, no person, while being held for trial or the results of trial, shall be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to punishment during such period for minor infractions of discipline.

ART. 14. Delivery of offenders to civil authorities.

(a) Under such regulations as the Secretary of the Department may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

(b) When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, such delivery, if followed by conviction in a civil tribunal, shall be held to interrupt the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon request, be returned to military custody for the completion of the said court-martial sentence.

## PART III—NON-JUDICIAL PUNISHMENT



ART. 15. Commanding officer's non-judicial punishment.

(a) Under such regulations as the President may prescribe, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers and warrant officers of his command:

(A) withholding of privileges for a period not to exceed two consecutive weeks; or

(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

(C) if imposed by an officer exercising general court-martial jurisdiction, forfeiture of one-half of his pay per month for a period not exceeding three months;

(2) upon other military personnel of his command:

(A) withholding of privileges for a period not to exceed two consecutive weeks; or

(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

(C) extra duties for a period not to exceed two consecutive weeks, and not to exceed two hours per days, holidays included; or

(D) reduction to next inferior grade if the grade from which demoted was established by the command or an equivalent or lower command; or

(E) confinement for a period not to exceed seven consecutive days; or

(F) confinement on bread and water or diminished rations for a period not to exceed five consecutive days; or

(G) if imposed by an officer exercising special court-martial jurisdiction, forfeiture of one-half of his pay for a period not exceeding one month.

(b) The Secretary of a Department may, by regulation, place limitations on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers authorized to exercise such powers, and the applicability of this article to an accused who demands trial by court martial.

(c) An officer in charge may, for minor offenses, imposed on enlisted persons assigned to the unit of which he is in charge, such of the punishments authorized to be imposed by commanding officers as the Secretary of the Department may by regulation specifically prescribe.

(d) A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through the proper channel,

appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The officer who imposes the punishment, his successor in command, and superior authority shall have power to suspend, set aside, or remit any part or amount of the punishment and to restore all rights, privileges, and property affected.

(e) The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

## PART IV—COURTS-MARTIAL JURISDICTION



ART. 16. Courts-martial classified.

There shall be three kinds of courts-martial in each of the armed forces, namely:

(1) General courts-martial, which shall consist of a law officer and any number of members not less than five;

(2) Special courts-martial, which shall consist of any number of members not less than three; and

(3) Summary courts-martial, which shall consist of one officer.

ART. 17. Jurisdiction of courts-martial in general.

(a) Each armed force shall have court-martial jurisdiction over all persons subject to this code. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.

(b) In all cases, departmental review subsequent to that by the officer with authority to convene a general court-martial for the command which held the trial, where such review is required under the provisions of this code, shall be carried out by the armed force of which the accused is a member.

ART. 18. Jurisdiction of general courts-martial.

Subject to article 17, general courts-martial shall have jurisdiction to try persons subject to this code for any offense made punishable by this code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code. General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.

ART. 19. Jurisdiction of special courts-martial.

Subject to article 17, special courts-martial shall have jurisdiction to try persons subject to this code for any noncapital offense made punishable by this code and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code except death, dishonorable discharge, dismissal, confinement in excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months. A bad-conduct discharge shall not be adjudged unless a complete record of the proceedings and testimony before the court has been made.

ART. 20. Jurisdiction of summary courts-martial.

Subject to article 17, summary courts-martial shall have jurisdiction to try persons subject to this code except officers, warrant officers, cadets, aviation cadets, and midshipmen for any noncapital offense made punishable by this code, but no person who objects thereto shall be brought to trial before a summary court-martial unless he has been permitted to refuse punishment under article 15. Where such objection is made by the accused, trial shall be ordered by special or general court-martial, as may be appropriate. Summary courts-martial may,

under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code except death, dismissal, dishonorable or bad-conduct discharge, confinement in excess of one month, hard labor without confinement in excess of forty-five days, restriction to certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay.

ART. 21. Jurisdiction of courts-martial not exclusive.

The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.

PART V—APPOINTMENT AND COMPOSITION OF COURTS-MARTIAL



ART. 22. Who may convene general courts-martial.

(a) General courts-martial may be convened by—

(1) the President of the United States;

(2) the Secretary of a Department;

(3) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army;

(4) the Commander in Chief of a Fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the continental limits of the United States;

(5) the commanding officer of an Air Command, an Air Force, an air division, or a separate wing of the Air Force;

(6) such other commanding officers as may be designated by the Secretary of a Department; or

(7) any other commanding officer in any of the armed forces when empowered by the President.

(b) When any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority when deemed desirable by him.

ART. 23. Who may convene special courts-martial.

(a) Special courts-martial may be convened by—

(1) any person who may convene a general court martial;

(2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary air field, or other place where members of the Army or Air Force are on duty;

(3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;

(4) the commanding officer of a wing, group, or separate squadron of the Air Force;

(5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; or of any marine brigade, regiment or barracks;

(6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or

(7) the commanding officer or officer in charge of any other command when empowered by the Secretary of a Department.

(b) When any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority when deemed advisable by him.

ART. 24. Who may convene summary courts-martial.

(a) Summary courts-martial may be convened by—

(1) any person who may convene a general or special court-martial;

(2) the commanding officer of a detached company, or other detachment of the Army;

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(3) the commanding officer of a detached squadron or other detachment of the Air Force; or

(4) the commanding officer or officer in charge of any other command when empowered by the Secretary of a Department.

(b) When but one officer is present with a command or detachment he shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him. Summary courts-martial may, however, be convened in any case by superior competent authority when deemed desirable by him.

ART. 25. Who may serve on courts-martial.

(a) Any officer on active duty with the armed forces shall be competent to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty with the armed forces shall be competent to serve on general and special courts-martial for the trial of any person, other than an officer, who may lawfully be brought before such courts for trial.

(c) Any enlisted person on active duty with the armed forces who is not a member of the same unit as the accused shall be competent to serve on general and special courts-martial for the trial of any enlisted person who may lawfully be brought before such courts for trial, but he shall be appointed as a member of a court only if, prior to the convening of such court, the accused has requested in writing that enlisted persons serve on it. After such a request, no enlisted person shall be tried by a general or special court-martial the membership of which does not include enlisted persons in a number comprising at least one-third of the total membership of the court, unless competent enlisted persons cannot be obtained on account of physical conditions or military exigencies. Where such persons cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

For the purposes of this article, the word "unit" shall mean any regularly organized body as defined by the Secretary of the Department, but in no case shall it be a body larger than a company, a squadron, or a ship's crew, or than a body corresponding to one of them.

(d) (1) When it can be avoided, no person in the armed forces shall be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall appoint as members thereof such persons as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

ART. 26. Law officer of a general court-martial.

(a) The authority convening a general court-martial shall appoint as law officer thereof an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and who is certified to be qualified for such duty by The Judge Advocate General of the armed force of which he is a member. No person shall be eligible to act as law officer in a case when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(b) The law officer shall not consult with the members of the court, other than on the form of the findings as provided in article 39, except in the presence of the accused, trial counsel, and defense counsel, nor shall he vote with the members of the court.

ART. 27. Appointment of trial counsel and defense counsel.

(a) For each general and special court-martial the authority convening the court shall appoint a trial counsel and a defense counsel, together with such assistants as he deems necessary or appropriate. No person who has acted as investigating officer, law officer, or court member in any case shall act subsequently as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for defense act subsequently in the same case for the prosecution.

(b) Any person who is appointed as trial counsel or defense counsel in the case of a general court-martial—

(1) shall be a judge advocate of the Army or the Air Force, or a law specialist of the Navy or Coast Guard, or a person who is a member of the bar of a Federal court or of the highest court of a State; and

(2) shall be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member.

(c) In the case of a special court-martial—

(1) if the trial counsel is certified as competent to act as counsel before a general court-martial by The Judge Advocate General of the armed force of which he is a member, the defense counsel appointed by the convening authority shall be a person similarly certified; and

(2) if the trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the defense counsel appointed by the convening authority shall be one of the foregoing.

ART. 28. Appointment of reporters and interpreters.

Under such regulations as the Secretary of the Department may prescribe, the convening authority of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission. Under like regulations the convening authority of a court-martial, military commission, or court of inquiry may appoint an interpreter who shall interpret for the court or commission.

ART. 29. Absent and additional members.

(a) No member of a general or special court-martial shall be absent or excused after the accused has been arraigned except for physical disability or as a result of a challenge or by order of the convening authority for good cause.

(b) Whenever a general court martial is reduced below five members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than five members. When such new members have been sworn, the trial may proceed after the recorded testimony of each witness previously examined has been read to the court in the presence of the law officer, the accused, and counsel.

(c) Whenever a special court martial is reduced below three members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than three members. When such new members have been sworn, the trial shall proceed as if no evidence had previously been introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read to the court in the presence of the accused and counsel.

## PART VI—PRETRIAL PROCEDURE



ART. 30. Charges and specifications.

(a) Charges and specifications shall be signed by a person subject to this code under oath before an officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that the same are true in fact to the best of his knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

ART. 31. Compulsory self-incrimination prohibited.

(a) No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation, and advising him that he does not have to make any statement at all regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this code shall compel any person to make a statement or produce evidence before or for use before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article or by any unlawful inducement shall be received in evidence against him in a trial by court-martial.

ART. 32. Investigation.

(a) No charge or specification shall be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiries as to the truth of the matter set forth in the charges, form of charges, and the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and shall be permitted, upon his own request, to be represented at such investigation by civilian counsel if provided by him, or military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction over the command. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted prior to the time the accused is charged with the offense, and if the accused was present at such investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subdivision (b) of this article, no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) The requirements of this article shall be binding on all persons administering this code, but failure to follow them in any case shall not constitute jurisdictional error.

ART. 33. Forwarding of charges.

When a person is held for trial by general court-martial, the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If the same is not practicable, he shall report to such officer the reasons for delay.

ART. 34. Advice of staff judge advocate and reference for trial.

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice. The convening authority shall not refer a charge to a general court-martial for trial unless it has been found that the charge alleges an offense under this code and is warranted by evidence indicated in the report of investigation.

(b) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence may be made.

ART. 35. Service of charges.

The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of the charges upon him, or before a special court-martial within a period of three days subsequent to the service of the charges upon him.

PART VII—TRIAL PROCEDURE



ART. 36. President may prescribe rules.

(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this code.

(b) All rules and regulations made in pursuance of this article shall be reported to the Congress.

ART. 37. Unlawfully influencing action of court.

No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this code shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

ART. 38. Duties of trial counsel and defense counsel.

(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(b) The accused shall have the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel duly appointed pursuant to article 27. Should the accused have counsel of his own selection, the duly appointed defense counsel, and assistant defense counsel, if any, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the president of the court.

(c) In every court-martial proceeding, the defense counsel may, in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he may deem appropriate.

(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by article 27, perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by article 27, perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

ART. 39. Sessions.

Whenever a general or special court-martial is to deliberate or vote, only the members of the court shall be present. After a general court-martial has finally

voted on the findings, the court may request the law officer and the reporter to appear before the court to put the findings in proper form, and such proceedings shall be on the record. All other proceedings, including any other consultation of the court with counsel or the law officer shall be made a part of the record and be in the presence of the accused, the defense counsel, the trial counsel, and in general court-martial cases, the law officer.

ART. 40. Continuances.

A court-martial may, for reasonable cause, grant a continuance to any party for such time and as often as may appear to be just.

ART. 41. Challenges.

(a) Members of a general or special court-martial and the law officer of a general court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The court shall determine the relevancy and validity of challenges for cause, and shall not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(b) The accused and trial counsel shall each be entitled to one peremptory challenge, but the law officer shall not be challenged except for cause.

ART. 42. Oaths.

(a) The law officer, all interpreters, and, in general and special courts-martial, the members, the trial counsel, assistant trial counsel, the defense counsel, assistant defense counsel, and the reporter shall take an oath or affirmation in the presence of the accused to perform their duties faithfully.

(b) All witnesses before courts-martial shall be examined on oath or affirmation.

ART. 43. Statute of limitations.

(a) A person charged with desertion or absence without leave in time of war, or with aiding the enemy, mutiny, or murder, may be tried and punished at any time without limitation.

(b) Except as otherwise provided in this article, a person charged with desertion in time of peace or any of the offenses punishable under articles 119 through 132 inclusive shall not be liable to be tried by court-martial if the offense was committed more than three years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(c) Except as otherwise provided in this article, a person charged with any offense shall not be liable to be tried by court-martial or punished under article 15 if the offense was committed more than two years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command or before the imposition of punishment under article 15.

(d) Periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article.

(e) In the case of any offense the trial of which in time of war is certified to the President by the Secretary of the Department to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article shall be extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

(f) When the United States is at war, the running of any statute of limitations applicable to any offense—

(1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not; or

(2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States; or

(3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation, or other termination or settlement, of any contract, subcontract or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency;

shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

ART. 44. Former jeopardy.

No person shall, without his consent, be tried a second time for the same offense: but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.

ART. 45. Pleas of the accused.

(a) If an accused arraigned before a court-martial makes any irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused shall not be received in a capital case.

ART. 46. Opportunity to obtain witnesses and other evidence.

The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, its Territories, and possessions.

ART. 47. Refusal to appear or testify.

(a) Every person not subject to this code who—

(1) has been duly subpenaed to appear as a witness before any court martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such court, commission, or board; and

(2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States; and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which such person may have been legally subpenaed to produce;

shall be deemed guilty of an offense against the United States.

(b) Any person who commits an offense denounced by this article shall be tried on information in a United States district court or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, and jurisdiction is hereby conferred upon such courts for such purpose. Upon conviction, such persons shall be punished by a fine of not more than $500, or imprisonment for a period not exceeding six months, or both.

(c) It shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, upon the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute any person violating this article.

(d) The fees and mileage of witnesses shall be advanced or paid out of the appropriations for the compensation of witnesses.

ART. 48. Contempts.

A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder. Such punishment shall not exceed confinement for thirty days or a fine of $100, or both.

ART. 49. Depositions.

(a) At any time after charges have been signed as provided in article 30, any party may take oral or written depositions unless an authority competent to convene a court-martial for the trial of such charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate officers to represent the prosecution and the defense and may authorize such officers to take the deposition of any witness.

(b) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

(c) Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

(d) A duly authenticated deposition taken upon reasonable notice to the other party, so far as otherwise admissible under the rules of evidence, may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears—

(1) that the witness resides or is beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing; or

(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(3) that the present whereabouts of the witness is unknown.

(e) Testimony by deposition may be adduced by the defense in capital cases

(f) A deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the convening authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial.

ART. 50. Admissibility of records of courts of inquiry.

(a) In any case not capital and not extending to the dismissal of an officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible, be read in evidence by any party before a court-martial or military commission if the accused was a party and was accorded the rights of an accused when before the court of inquiry or if the accused consents to the introduction of such evidence.

(b) Such testimony may be read in evidence only by the defense in capital cases or cases extending to the dismissal of an officer.

(c) Such testimony may also be read in evidence before a court of inquiry or a military board.

ART. 51. Voting and rulings.

(a) Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(b) The law officer of a general court-martial and the president of a special court-martial shall rule upon interlocutory questions, other than challenge, arising during the proceedings. Any such ruling made by the law officer of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, shall be final and shall constitute the ruling of the court; but the law officer may change any such ruling at any time during the trial. Unless such ruling be final, if any member objects thereto, the court shall be cleared and closed and the question decided by a vote as provided in article 52, viva voce, beginning with the junior in rank.

(c) Before a vote is taken on the findings, the law officer of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted;

(3) that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no such doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government.

ART. 52. Number of votes required.

(a) (1) No person shall be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.

(2) No person shall be convicted of any other offense, except by the concurrence of two-thirds of the members present at the time the vote is taken.

(b) (1) No person shall be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this code made expressly punishable by death.

(2) No person shall be sentenced to life imprisonment or to confinement in excess of ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote. A tie vote on a challenge shall disqualify the member challenged. A tie vote on a motion for a finding of not guilty or on a question of the accused's sanity shall be a determination against the accused. A tie vote on any other question shall be a determination in favor of the accused.

ART. 53. Court to announce action.

Every court-martial shall announce its findings and sentence to the parties as soon as determined.

ART. 54. Record of trial.

(a) Each general court-martial shall keep a separate record of the proceedings of the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the law officer. In case the record cannot be authenticated by either the president or the law officer, by reason of the death, disability, or absence of such officer, it shall be signed by a member in lieu of him. If both the president and the law officer are unavailable for such reasons, the record shall be authenticated by two members.

(b) Each special and summary court-martial shall keep a separate record of the proceedings in each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the president may prescribe.

(c) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as authenticated.

## PART VIII—SENTENCES

Article
55. Cruel and unusual punishments prohibited.
56. Maximum limits.
57. Effective date of sentences.
58. Execution of confinement.

ART. 55. Cruel and unusual punishments prohibited.

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, shall not be adjudged by any court-martial or inflicted upon any person subject to this code. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

ART. 56. Maximum limits.

The punishment which a court-martial may direct for an offense shall not exceed such limits as the President may prescribe for that offense.

ART. 57. Effective date of sentences.

(a) Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture may apply to pay or allowances becoming due on or after the date such sentence is approved by the convening authority. No forfeiture shall extend to any pay or allowances accrued before such date.

(b) Any period of confinement not suspended included in a sentence of a court-martial shall begin to run from the date the sentence is adjudged by the court-martial.

(c) All other sentences of courts-martial shall become effective on the date ordered executed.

ART. 58. Execution of confinement.

(a) Under such instructions as the Department concerned may prescribe, any sentence of confinement adjudged by a court-martial or other military tribunal, whether or not such sentence includes discharge or dismissal, and whether or not such discharge or dismissal has been executed, may be carried into execution

by confinement in any place of confinement under the control of any of the armed forces, or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use; and persons so confined in a penal or correctional institution not under the control of one of the armed forces shall be subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District, or place in which the institution is situated.

(b) The omission of the words "hard labor" in any sentence of a court-martial adjudging confinement shall not be construed as depriving the authority executing such sentence of the power to require hard labor as a part of the punishment.

## PART IX—REVIEW OF COURTS-MARTIAL



ART. 59. Error of law; lesser included offense.

(a) A finding or sentence of a court-martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

(b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.

ART. 60. Initial action on the record.

After every trial by court-martial the record shall be forwarded to the convening authority, and action thereon may be taken by the officer who convened the court, an officer commanding for the time being, a successor in command, or by any officer exercising general court-martial jurisdiction.

ART. 61. Same—General court-martial records.

The convening authority shall refer the record of every general court-martial to his staff judge advocate or legal officer, who shall submit his written opinion thereon to the convening authority. If the final action of the court has resulted in an acquittal of all charges and specifications, the opinion shall be limited to questions of jurisdiction and shall be forwarded with the record to The Judge Advocate General of the armed force of which the accused is a member.

ART. 62. Reconsideration and revision.

(a) If a case before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action.

(b) Where there is an apparent error or omission in the record or where the record shows improper action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned—

(1) for reconsideration of a finding of not guilty or a ruling which amounts to a finding of not guilty; or

(2) for increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.

ART. 63. Rehearings.

(a) If the convening authority disapproves the findings and sentence of a court-martial he may, except where there is lack of sufficient evidence in the

record to support the findings, order a rehearing, in which case he shall state the reasons for disapproval. If he does not order a rehearing, he shall dismiss the charges.

(b) Every rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory.

ART. 64. Approval by the convening authority.

In acting on the findings and sentence of a court-martial, the convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence as he finds correct in law and fact and determines should be approved. Unless he indicates otherwise, approval of the sentence shall constitute approval of the findings and sentence.

ART. 65. Disposition of records after review by the convening authority.

(a) When the convening authority has taken final action in a general court-martial case, he shall forward the entire record, including his action thereon and the opinion or opinions of the staff judge advocate or legal officer, to the appropriate Judge Advocate General.

(b) Where the sentence of a special court-martial as approved by the convening authority includes a bad-conduct discharge, whether or not suspended, the record shall be forwarded to the officer exercising general court-martial jurisdiction over the command to be reviewed in the same manner as a record of trial by general court-martial or directly to the appropriate Judge Advocate General to be reviewed by a board of review. If the sentence as approved by an officer exercising general court-martial jurisdiction includes a bad-conduct discharge, whether or not suspended, the record shall be forwarded to the appropriate Judge Advocate General to be reviewed by a board of review.

(c) All other special and summary court-martial records shall be reviewed by a judge advocate of the Army or Air Force, a law specialist of the Navy, or a law specialist or lawyer of the Coast Guard or Treasury Department and shall be transmitted and disposed of as the Secretary of the Department may prescribe by regulations.

ART. 66. Review by the board of review.

(a) The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.

(b) The Judge Advocate General shall refer to a board of review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for more than one year.

(c) In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. Otherwise it shall order that the charges be dismissed.

(e) Within ten days after any decision by a board of review, the Judge Advocate General may refer the case for reconsideration to the same or another board of review.

(f) Otherwise, the Judge Advocate General shall, unless there is to be further action by the President or the Secretary of the Department or the Judicial Council, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing

but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(g) The Judge Advocates General of the armed forces shall prescribe uniform rules of procedure for proceedings in and before boards of review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by the boards of review.

ART. 67. Review by the Judicial Council.

(a) There is hereby established in the National Military Establishment a Judicial Council. The Judicial Council shall be composed of not less than three members. Each member of the Judicial Council shall be appointed by the President from civilian life and shall be a member of the bar admitted to practice before the Supreme Court of the United States, and each member shall receive compensation and allowances equal to those paid to a judge of a United States Court of Appeals.

(b) Under rules of procedure which it shall prescribe, the Judicial Council shall review the record in the following cases:

(1) All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;

(2) All cases reviewed by a board of review which The Judge Advocate General orders forwarded to the Judicial Council for review; and

(3) All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Judicial Council has granted a review.

(c) The accused shall have thirty days from the time he is notified of the decision of a board of review to petition the Judicial Council for a grant of review. The Judicial Council shall act upon such a petition within fifteen day of the receipt thereof.

(d) In any case reviewed by it, the Judicial Council shall act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review. In a case which the Judge Advocate General orders forwarded to the Judicial Council, such action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, such action need be taken only with respect to issues specified in the grant of review. The Judicial Council shall take action only with respect to matters of law.

(e) If the Judicial Council sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. Otherwise it shall order that the charges be dismissed.

(f) After it has acted on a case, the Judicial Council may direct The Judge Advocate General to return the record to the board of review for further review in accordance with the decision of the Judicial Council. Otherwise, unless there is to be further action by the President, or the Secretary of the Department, The Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the Judicial Council has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(g) The Judicial Council and The Judge Advocates General of the armed forces shall meet annually to make a comprehensive survey of the operation of this code and report to the Secretary of Defense and the Secretaries of the Departments any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate.

ART. 68. Branch offices.

(a) Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office one or more boards of review. Such Assistant Judge Advocate General and any such board of review shall be empowered to perform for that command, under the general supervision of The Judge Advocate General, the duties which The Judge Advocate General and a board of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval by the President.

(b) In time of emergency, the President may direct that one or more temporary Judicial Councils be established for the period of the emergency, each of which shall be under the general supervision of the Judicial Council.

ART. 69. Review in the office of The Judge Advocate General.

Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by article 66, shall be examined in the office of The Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if The Judge Advocate General so directs, the record shall be reviewed by a board of review in accordance with article 66, but in such event there will be no further review by the Judicial Council.

ART. 70. Appellate counsel.

(a) The Judge Advocate General shall appoint in his office one or more officers as appellate Government counsel, and one or more officers as appellate defense counsel.

(b) It shall be the duty of appellate Government counsel to represent the United States before the board of review or the Judicial Council when directed to do so by The Judge Advocate General.

(c) It shall be the duty of appellate defense counsel to represent the accused before the board of review or the Judicial Council—

(1) when he is requested to do so by the accused; or

(2) when the United States is represented by counsel; or

(3) when The Judge Advocate General has requested the reconsideration of a case before the board of review or has transmitted it to the Judicial Council.

(d) The accused shall have the right to be represented before the Judicial Council or the board of review by civilian counsel if provided by him.

(e) The appellate counsel shall also perform such other functions in connection with the review of court-martial cases as The Judge Advocate General shall direct.

ART. 71. Execution of sentence; suspension of sentence.

(a) No court-martial sentence extending to death or involving a general or flag officer shall be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence.

(b) No sentence extending to the dismissal of an officer, cadet or midshipman shall be executed until approved by the Secretary of the Department, or such Under Secretary or Assistant Secretary as may be designated by him. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of any part of the sentence as approved by him. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person who is so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(c) No sentence which includes, unsuspended, a dishonorable or bad conduct discharge, or confinement for more than one year shall be executed until affirmed by a board of review and, in cases reviewed by it, the Judicial Council.

(d) All other court-martial sentences, unless suspended, may be ordered executed by the convening authority when approved by him. The convening authority may suspend the execution of any sentence, except a death sentence.

ART. 72. Vacation of suspension.

(a) Prior to the vacation of the suspension of a special court-martial sentence which as approved includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation. The probationer shall be represented at such hearing by counsel if he so desires.

(b) The record of the hearing and the recommendations of the officer having special court-martial jurisdiction shall be forwarded for action to the officer exercising general court-martial jurisdiction over the probationer. If he vacates the suspension, the vacation shall be effective, subject to applicable restrictions in article 71 (c), to execute any unexecuted portion of the sentence except a dismissal. The vacation of the suspension of a dismissal shall not be effective until approved by the Secretary of the Department.

(c) The suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence.

ART. 73. Petition for a new trial.

At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for more than one year, the accused may petition The Judge Advocate General for a new trial on grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before the board of review or before the Judicial Council. The Judge Advocate General shall refer the petition to the board or Council, respectively, for action. Otherwise The Judge Advocate General shall act upon the petition.

ART. 74. Remission and suspension.

(a) The Secretary of the Department and any Under Secretary, Assistant Secretary, or commanding officer designated by the Secretary may remit or suspend any part or amount of the unexecuted portion of any sentence, including all uncollected forfeitures, other than a sentence approved by the President.

(b) The Secretary of the Department may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

ART. 75. Restoration.

(a) Under such regulations as the President may prescribe, all rights, privileges, and property affected by an executed portion of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed portion is included in a sentence imposed upon the new trial or rehearing.

(b) Where a previously executed sentence of dishonorable or bad-conduct discharge is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of his enlistment.

(c) Where a previously executed sentence of dismissal is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance and the officer dismissed by such sentence may be reappointed by the President alone to such commissioned rank and precedence as in the opinion of the President such former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to position vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and such reappointment shall be considered as actual service for all purposes, including the right to receive pay and allowances.

ART. 76. Finality of court-martial judgments.

The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review or, reaffirmation as required by this code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74.

## PART X—PUNITIVE ARTICLES

Article
77. Principals.
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79. Conviction of lesser included offense.
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ART. 77. Principals.

Any person punishable under this code who—

(1) commits an offense punishable by this code, or aids, abets, counsels, commands, or procures its commission; or

(2) causes an act to be done which if directly performed by him would be punishable by this code;

shall be punished with the punishment provided for the commission of the offense.

ART. 78. Accessory after the fact.

Any person subject to this code who, knowing that an offense punishable by this code has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct.

ART. 79. Conviction of lesser included offense.

An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.

ART. 80. Attempts.

(a) An act, done with specific intent to commit an offense under this code, amounting to more than mere preparation and tending but failing to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this code who attempts to commit any offense punishable by this code shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this code may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

ART. 81. Conspiracy.

Any person subject to this code who conspires with any other person or persons to commit an offense under this code shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

ART. 82. Solicitation.

(a) Any person subject to this code who solicits or advises another or others to desert in violation of article 85 or mutiny in violation of article 94 shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(b) Any person subject to this code who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of article 99 or sedition in violation of article 94 shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.

ART. 83. Fraudulent enlistment, appointment, or separation.

Any person who—

(1) procures his own enlistment or appointment in the armed forces by means of knowingly false representations or deliberate concealment as to his qualifications for such enlistment or appointment and receives pay or allowances thereunder; or

(2) procures his own separation from the armed forces by means of knowingly false representations or deliberate concealment as to his eligibility for such separation;

shall be punishable as a court martial may direct.

ART. 84. Unlawful enlistment, appointment, or separation.

Any person subject to this code who effects an enlistment in or a separation from the armed forces of any person who is known to him to be ineligible for such enlistment, appointment, or sepaartion because it is prohibited by law, regulation, or order shall be punished as a court martial may direct.

ART. 85. Desertion.

(a) Any member of the armed forces of the United States who—

(1) without proper authority goes or remains absent from his place of service, organization, or place of duty with intent to remain away therefrom permanently; or

(2) quits his unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service; or

(3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact he has not been so regularly separated, or enters any foreign armed service except when authorized by the United States;

is quilty of desertion.

(b) Any officer of the armed forces who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post at proper duties without leave and with intent to remain away therefrom permanently is quilty of desertion.

(c) Any person found quilty of desertion or attempted desertion shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempted desertion occurs at any other time, by such punishment, other than death, as a court-martial may direct.

ART. 86. Absence without leave.

Any person subject to this code who, without proper authority—

(1) fails to go to his appointed place of duty at the time prescribed; or

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or other place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct.

ART. 87. Missing movement.

Any person subject to this code who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct.

ART. 88. Disrespect towards officials.

Any officer who uses contemptuous or disrespectful words against the President, Vice President, Congress, Secretary of Defense, or a Secretary of a Department, a Governor or a legislature of any State, Territory, or other possession of the United States in which he is on duty or present shall be punished as a court-martial may direct.

ART. 89. Disrespect towards superior officer.

Any person subject to this code who behaves with disrespect towards his superior officer shall be punished as a court-martial may direct.

ART. 90. Assaulting or willfully disobeying officer.

Any person subject to this code who—

(1) strikes his superior officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

ART. 91. Insubordinate conduct towards noncommissioned officer.

Any warrant officer or enlisted person who—

(1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while such officer is in the execution of his office; or

(2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or

(3) treats with contempt or is disrespectful in language or deportment towards a warrant officer, noncommissioned officer, or petty officer while such officer is in the execution of his office;

shall be punished as a court-martial may direct.

ART. 92. Failure to obey order or regulation.

Any person subject to this code who—

(1) violates or fails to obey any lawful general order or regulation; or

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

ART. 93. Cruelty and maltreatment.

Any person subject to this code who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

ART. 94. Mutiny or sedition.

(a) Any person subject to this code—

(1) who with intent to usurp or override lawful military authority refuses, in concert with any other person or persons, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny;

(2) who with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person or persons, revolt, violence, or other disturbance against such authority is guilty of sedition;

(3) who fails to do his utmost to prevent and suppress an offense of mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior or commanding officer of an offense of mutiny or sedition which he knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.

(b) A person who is found guilty of attempted mutiny, mutiny, sedition, or failure to suppress or report a mutiny or sedition shall be punished by death or such other punishment as a court-martial may direct.

ART. 95. Arrest and confinement.

Any person subject to this code who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct.

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ART. 96. Releasing prisoner without proper authority.

Any person subject to this code who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct.

ART. 97. Unlawful detention of another.

Any person subject to this code who, except as provided by law, apprehends, arrests, or confines any person shall be punished as a court-martial may direct.

ART. 98. Noncompliance with procedural rules.

Any person subject to this code who—

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this code; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this code regulating the proceedings before, during, or after trial of an accused;

shall be punished as a court-martial may direct.

ART. 99. Misbehavior before the enemy.

Any member of the armed forces who before or in the presence of the enemy—

(1) runs away; or

(2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend; or

(3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property; or

(4) casts away his arms or ammunition; or

(5) is guilty of cowardly conduct; or

(6) quits his place of duty to plunder or pillage; or

(7) causes false alarms in any command, unit, or place under control of the armed forces; or

(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or

(9) does not afford all practical relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle;

shall be punished by death or such other punishment as a court-martial may direct.

ART. 100. Subordinate compelling surrender.

Any person subject to this code who compels or attempts to compel a commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces, to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished by death or such other punishment as a court-martial may direct.

ART. 101. Improper use of countersign.

Any person subject to this code who in time of war discloses the parole or countersign to any person not entitled to receive it or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to his knowledge, he was authorized and required to give, shall be punished by death or such other punishment as a court-martial may direct.

ART. 102. Forcing a safeguard.

Any person subject to this code who forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

ART. 103. Captured or abandoned property.

(a) All persons subject to this code shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody, or control.

(b) Any person subject to this code who—

(1) fails to carry out the duties prescribed in subdivision (a) of this article; or

(2) buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit,

or advantage to himself or another directly or indirectly connected with himself; or

(3) engages in looting or pillaging;

shall be punished as a court-martial may direct.

ART. 104. Aiding the enemy.

Any person who—

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other thing; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or military commission may direct.

ART. 105. Misconduct as prisoner.

Any person subject to this code who, while in the hands of the enemy in time of war—

(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

(2) while in a position of authority over such persons maltreats them without justifiable cause;

shall be punished as a court-martial may direct.

ART. 106. Spies.

Any person who in time of war is found lurking or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces of the United States, or in or about any shipyard, any manufacturing or industrial plant, or any other place of institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.

ART. 107. False official statements.

Any person subject to this code who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing the same to be false, or makes any other false official statement knowing the same to be false, shall be punished as a court-martial may direct.

ART. 108. Military property of United States—Loss, damage, destruction, or wrongful disposition

Any person subject to this code who, without proper authority—

(1) sells or otherwise disposes of; or

(2) willfully or through neglect damages, destroys, or loses; or

(3) willfully or through neglect suffers to be lost, damaged, destroyed, sold or wrongfully disposed of; any military property of the United States shall be punished as a court-martial may direct.

ART. 109. Property other than military property of United States—Waste, spoil, or destruction.

Any person subject to this code who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct.

ART. 110. Improper hazarding of vessel.

(a) Any person subject to this code who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such other punishment as a court-martial may direct.

(b) Any person subject to this code who negligently hazards or suffers to be hazarded any vessel of the armed forces, shall be punished as a court-martial may direct.

ART. 111. Drunken or reckless driving.

Any person subject to this code who operates any vehicle while drunk, or in a reckless or wanton manner, shall be punished as a court-martial may direct.

ART. 112. Drunk on duty.

Any person subject to this code, other than a sentinel or look-out, who is found drunk on duty, shall be punished as a court-martial may direct.

ART. 113. Misbehavior of sentinel.

Any sentinel or look-out who is found drunk or sleeping upon his post, or leaves it before he is regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as a court-martial may direct.

ART. 114. Dueling.

Any person subject to this code who fights or promotes, or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct.

ART. 115. Malingering.

Any person subject to this code who for the purpose of avoiding work, duty, or service—

(1) feigns illness, physical disablement, mental lapse or derangement; or

(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.

ART. 116. Riot or breach of peace.

Any person subject to this code who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.

ART. 117. Provoking speeches or gestures.

Any person subject to this code who uses provoking or reproachful words or gestures towards any other person subject to this code shall be punished as a court-martial may direct.

ART. 118. Murder.

Any person subject to this code, who, without justification or excuse, kills a human being, when he—

(1) has a premeditated design to kill; or

(2) intends to kill or inflict great bodily harm; or

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson, though he has no intent to kill;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under paragraph (1) of this article, he shall suffer death or imprisonment for life as a court-martial may direct.

ART. 119. Manslaughter.

Any person subject to this code who, without a design to effect death, kills a human being—

(1) in the heat of sudden passion; or

(2) by culpable negligence; or

(3) while perpetrating or attempting to perpetrate an offense, other than those specified in paragraph (4) of article 118, directly affecting the person;

is guilty of manslaughter and shall be punished as a court martial may direct.

ART. 120. Rape.

(a) Any person subject to this code who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of rape shall be punished by death or such other punishment as a court-martial may direct.

ART. 121. Larceny.

Any person subject to this code who, with intent to deprive or defraud another of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner, wrongfully takes, obtains,

or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, or article of value of any kind, steals such property and is guilty of larceny, and shall be punished as a court-martial may direct.

ART. 122. Robbery.

Any person subject to this code who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery, and shall be punished as a court-martial may direct.

ART. 123. Forgery.

Any person subject to this code who, with intent to defraud—

(1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or

(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered;

is guilty of forgery and shall be punished as a court-martial may direct.

ART. 124. Maiming.

Any person subject to this code who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which—

(1) seriously disfigures his person by any mutilation thereof; or

(2) destroys or disables any member or organ of his body; or

(3) seriously diminishes his physical vigor by the injury of any member or organ;

is guilty of maiming and shall be punished as a court-martial may direct.

ART. 125. Sodomy.

(a) Any person subject to this code who engages in unnatural carnal copulation with another of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

ART. 126. Arson.

(a) Any person subject to this code who willfully and maliciously burns or sets on fire a dwelling in which there is at the time a human being, or any other structure, water craft, or movable, wherein to the knowledge of the offender there is at the time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.

(b) Any person subject to this code who willfully and maliciously burns or sets fire to the property of another, except as provided in subdivision (a) of this article, is guilty of simple arson and shall be punished as a court-martial may direct.

ART. 127. Extortion.

Any person subject to this code who communicates threats to another with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity of any description is guilty of extortion and shall be punished as a court-martial may direct.

ART. 128. Assault.

(a) Any person subject to this code who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this code who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

ART. 129. Burglary.

Any person subject to this code who, with intent to commit an offense punishable under articles 118 through 128 inclusive, breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct.

ART. 130. Housebreaking.

Any person subject to this code who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

ART. 131. Perjury.

Any person subject to this code who in a judicial proceeding or course of justice willfully and corruptly gives, upon a lawful oath or in any form allowed by law to be substituted for an oath, any false testimony material to the issue or matter of inquiry is guilty of perjury and shall be punished as a court-martial may direct.

ART. 132. Frauds against the Government.

Any person subject to this code—

(1) who, knowing it to be false or fraudulent—

(A) makes any claim against the United States or any officer thereof; or

(B) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof; or

(2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States or any officer thereof—

(A) makes or uses any writing or other paper knowing the same to contain any false or fraudulent statements;

(B) makes any oath to any fact or to any writing or other paper knowing such oath to be false; or

(C) forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing the same to be forged or counterfeited; or

(3) who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the armed forces thereof, knowingly delivers to any person having authority to receive the same, any amount thereof less than that for which he received a certificate or receipt; or

(4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States;

shall, upon conviction, be punished as a court-martial may direct.

ART. 133. Conduct unbecoming an officer and gentleman.

Any officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the armed forces.

ART. 134. General article.

Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

## PART XI—MISCELLANEOUS PROVISIONS

Article

135. Courts of inquiry.
136. Authority to administer oaths and to act as notary.
137. Articles to be explained.
138. Complaints of wrongs.
139. Redress of injuries to property.
140. Delegation by the President.

ART. 135. Courts of inquiry.

(a) Courts of inquiry to investigate any matter may be convened by any person authorized to convene a general court-martial or by any other person designated by the Secretary of a Department for that purpose whether or not the persons involved have requested such an inquiry.

(b) A court of inquiry shall consist of three or more officers. For each court of inquiry the convening authority shall also appoint counsel for the court.

(c) Any person subject to this code whose conduct is subject to inquiry shall be designated as a party. Any person subject to this code or employed by the National Military Establishment who has a direct interest in the subject of inquiry shall have the right to be designated as a party upon request to the court. Any person designated as a party shall be given due notice and shall have the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence.

(d) Members of a court of inquiry may be challenged by a party, but only for the cause stated to the court.

(e) The members, counsel, the reporter, and interpreters of courts of inquiry shall take an oath or affirmation to faithfully perform their duties.

(f) Witnesses may be summoned to appear and testify and be examined before courts of inquiry as provided for courts-martial.

(g) Courts of inquiry shall make findings of fact but shall not express opinions or make recommendations unless required to do so by the convening authority.

(h) Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. In case the record cannot be authenticated by the president it shall be signed by a member in lieu of the president and in case the record cannot be authenticated by the counsel for the court it shall be signed by a member in lieu of the counsel.

ART. 136. Authority to administer oaths and to act as notary.

(a) The following persons on active duty in the armed forces shall have authority to administer oaths for the purposes of military administration, including military justice, and shall have the general powers of a notary public and of a consul of the United States, in the performance of all notarial acts to be executed by members of any of the armed forces, wherever they may be, and by other persons subject to this code outside the continental limits of the United States:

(1) All judge advocates of the Army and Air Force;

(2) All law specialists;

(3) All summary courts-martial;

(4) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants;

(5) All commanding officers of the Navy and Coast Guard;

(6) All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers; and

(7) All other persons designated by regulations of the armed forces or by statute.

(b) The following persons on active duty in the armed forces shall have authority to administer oaths necessary in the performance of their duties:

(1) Thh president, law officer, trial counsel, and assistant trial counsel for all general and special courts-martial;

(2) The president and the counsel for the court of any court of inquiry;

(3) All officers designated to take a deposition;

(4) All persons detailed to conduct an investigation;

(5) All recruiting officers; and

(6) All other persons designated by regulations of the armed forces or by statute.

(c) No fee of any character shall be paid to or received by any person for the performance of any notarial act herein authorized.

(d) The signature without seal of any such person acting as notary, together with the title of his office, shall be prima facie evidence of his authority.

ART. 137. Articles to be explained.

Articles 2, 3, 7 through 15, 25, 27, 31, 37, 38, 55, 77 through 134, and 137 through 139 of this code shall be carefully explained to every enlisted person at the time of his entrance on active duty in any of the armed forces of the United States, or within six days thereafter. They shall be explained again after he has

completed six months of active duty, and again at the time he reenlists. A complete text of the Uniform Code of Military Justice and of the regulations prescribed by the President thereunder shall be made available to any person on active duty in the armed forces of the United States, upon his request, for his personal examination.

ART. 138. Complaints of wrongs.

Any member of the armed forces who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to any superior officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department concerned a true statement of such complaint, with the proceedings had thereon.

ART. 139. Redress of injuries to property.

(a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces he may, subject to such regulations as the Secretary of the Department may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three officers and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of such commanding officer directing charges herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the damages so assessed and approved.

(b) Where the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be deemed just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.

ART. 140. Delegation by the President.

The President is authorized to delegate any authority vested in him under this code, and to provide for the subdelegation of any such authority.

SEC. 2. If any article or part thereof, as set out in section 1 of this Act, shall be held invalid, the remainder shall not be affected thereby.

SEC. 3. No inference of a legislative construction is to be drawn by reason of the part in which any article is placed nor by reason of the catch lines of the part or the article as set out in section 1 of this Act.

SEC. 4. All offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the effective date of this Act under any law embraced in or modified, changed, or repealed by this Act may be prosecuted, punished, and enforced, and action thereon may be completed, in the same manner and with the same effect as if this Act had not been passed.

SEC. 5. This Act shall become effective on the last day of the twelfth calendar month after approval of this Act, or on July 1, 1950, whichever date is later.

SEC. 6. Articles of War 107, 108, 112, 113, 119, and 120 (41 Stat. 809, 810, 811), as amended are further amended as follows:

(a) Delete from article 107, the words "Article 107."

(b) Delete from article 108, the words "Article 108."

(c) Delete from article 112, the words "Article 112."

(d) Delete from article 113, the words "Article 113."

(e) Delete from article 119, the words "Article 119."

(f) Delete from article 120, the words "Article 120."

These provisions as amended herein shall be construed to have the same force, effect, and applicability as they now have, but shall not be known as "Articles of War."

SEC. 7. (a) AUTHORITY OF NAVAL OFFICERS AFTER LOSS OF VESSEL.—When the crew of any naval vessel or aircraft are separated from their vessel or aircraft by means of its wreck, loss, or destruction, all the command and authority

given to the officer of such vessel or aircraft shall remain in full force until such crew shall be regularly discharged or reassigned by competent authority.

(b) AUTHORITY OF OFFICERS OF SEPARATE ORGANIZATION OF MARINES.—When a force of marines is embarked on a naval vessel or vessels, as a separate organization, not a part of the authorized complement thereof, the authority and powers of the officers of such separate organizations of marines shall be the same as though such organization were serving at a naval station on shore, but nothing herein shall be construed as impairing the paramount authority of the commanding officer of any vessel over the vessel under his command and all persons embarked thereon.

(c) COMMANDERS' DUTIES OF EXAMPLE AND CORRECTION.—All commanding officers and others in authority in the naval service are required to show in themselves a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and to take all necessary and proper measures, under the laws, regulations, and customs of the naval service, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

(d) DIVINE SERVICE.—The commanders of vessels and naval activities to which chaplains are attached shall cause divine service to be performed on Sunday, whenever the weather and other circumstances allow it to be done; and it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God.

(e) REVERENT BEHAVIOR.—All persons in the Navy are enjoined to behave themselves in a reverent and becoming manner during divine service.

OATH OF ENLISTMENT

SEC. 8. Every person who is enlisted in any armed force shall take the following oath or affirmation at the time of his enlistment: "I, _____, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice." This oath ar affirmation may be taken before any officer.

REMOVAL OF CIVIL SUITS

SEC. 9. When any civil or criminal prosecution is commenced in any court of a State of the United States against any member of the armed forces of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the armed forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed by law, and the cause shall thereupon be entered on the docket of such district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine said cause.

DISMISSAL OF OFFICERS

SEC. 10. No officer shall be dismissed from any of the armed forces except by sentence of a general court-martial, or in commutation thereof, or, in time of war, by order of the President; but the President may at any time drop from the rolls of any armed force any officer who has been absent without authority from his place of duty for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.

SEC. 11. The proviso of section 3 of the Act of April 9, 1906 (34 Stat. 104, ch. 1370), is amended to read as follows:

"*Provided*, That such midshipman shall not be confined in a military or naval prison or elsewhere with men who have been convicted of crimes or misdemeanors; and such finding and sentence shall be subject to review in the manner prescribed for general court-martial cases."

SEC. 12. The following sections or parts thereof of the Revised Statutes or Statutes at Large are hereby repealed. Any rights or liabilities existing under such sections or parts thereof prior to the effective date of this Act shall not be affected by this repeal, and this Act shall not be effective to authorize trial or punishment for any offense if such trial or punishment is barred by the provisions of existing law:

(a) Chapter II of the Act of June 4, 1920 (41 Stat. 759, 787–811, ch. 227), as amended, except Articles of War 107, 108, 112, 113, 119, and 120;

(b) Revised Statutes, 1228 through 1230;

(c) Act of January 19, 1911 (36 Stat. 894, ch. 22);

(d) Paragraph 2 of section 2 of the Act of March 4, 1915 (38 Stat. 1062, 1084, ch. 143);

(e) Revised Statutes 1441, 1621, and 1624, articles 1 through 14 and 16 through 63, as amended;

(f) The provision of section 1457, Revised Statutes, which subjects officers retired from active service to the rules and articles for the government of the Navy and to trial by general court-martial;

(g) Section 2 of the Act of June 22, 1874 (18 Stat. 191, 192, ch. 392);

(h) The provision of the Act of March 3, 1893 (27 Stat. 715, 716, ch. 212), under the heading "Pay, Miscellaneous", relating to the punishment for fraudulent enlistment and receipt of any pay or allowances thereunder;

(i) Act of January 25, 1895 (28 Stat. 639, ch. 45), as amended;

(j) Provisions contained in the Act of March 2, 1895 (28 Stat. 825, 838, ch. 186), as amended, under the heading "Naval Academy", relating to the power of the Secretary of the Navy to convene general courts-martial for the trial of naval cadets (title changed to "midshipmen" by Act of July 1, 1902, 32 Stat. 662, 686, ch. 1368), his power to approve proceedings and execute sentences of such courts-martial, and the exceptional provision relating to approval, confirmation, and carrying into effect of sentences of suspension and dismissal;

(k) Sections 1 through 12 and 15 through 17 of the Act of February 16, 1909 (35 Stat. 621, 623, ch. 131);

(l) The provision of the Act of August 29, 1916 (39 Stat. 556, 573, ch. 417), under the heading "Hospital Corps", making officers and enlisted men of the Medical Department of the Navy who are serving with a body of marines detached for service with the Army subject to the rules and Articles of War while so serving;

(m) The provisions in the Act of August 29, 1916 (39 Stat. 556, 586, ch. 417), under the heading "Administration of Justice";

(n) Act of October 6, 1917 (40 Stat. 393, ch. 93);

(o) Act of April 2, 1918 (40 Stat. 501, ch. 39);

(p) Act of April 25, 1935 (49 Stat. 161, ch. 81);

(q) The third proviso of section 6, title I, of the Naval Reserve Act of 1938 (52 Stat. 1175, 1176, ch. 690);

(r) Section 301, title III, of the Naval Reserve Act of 1938 (52 Stat. 1175, 1180, ch. 690);

(s) Act of March 22, 1943 (57 Stat. 41, ch. 18);

(t) Act of April 9, 1943 (57 Stat. 58, ch. 36);

(u) Sections 2, 3, 4, 6, and 7 of the Act of May 26, 1906 (34 Stat. 200, 201, ch. 2556);

(v) The provision of the Act of June 5, 1920 (41 Stat. 874, 880, ch. 235), under the heading "Coast Guard", authorizing the trial of enlisted men in the Coast Guard by deck courts.

Senator KEFAUVER. I am informed that a subcommittee of the House Armed Services Committee, of which Mr. Brooks is the chairman, has conducted extended hearings on an identical House bill, H. R. 2498. Printed copies of these hearings are before each committee member. As a result of these hearings, numerous changes have been made in the reading of the bill, and Mr. Brooks has introduced a new bill, H. R. 4080, incorporating these changes. The House subcommittee is presenting H. R. 4080 to the full House Armed Services Committee today. Copies of H. R. 4080 are before each committee member, and these copies have been marked up to show the amendments made to the original bill.

S. 857 was introduced at the request of Mr. Forrestal, after long study by a committee appointed by him to study this problem. The members of the committee that drafted this bill are:

Prof. E. M. Morgan, Jr., professor of law, Harvard University.

Mr. Gordon Gray, Assistant Secretary of the Army.

Mr. W. John Kenney, Under Secretary of the Navy.

Mr. E. M. Zuckert, Assistant Secretary of the Air Force.

Mr. F. E. Larkin, assistant general counsel to the Secretary of Defense.

Today we are very happy to have as witnesses Professor Morgan and Mr. Larkin, the chairman and executive secretary of the committee, respectively.

Professor Morgan has given this entire matter a great deal of study, and was very helpful and instrumental in the preparation of the departmental bill, S. 857, which we have before us today, and we appreciate greatly your coming down, Professor Morgan, to give the committee the benefit of your views and testimony.

We will be glad to hear from you at this time.

## STATEMENT OF E. M. MORGAN, JR., PROFESSOR OF LAW, HARVARD UNIVERSITY

Mr. MORGAN. Thank you, Mr. Chairman.

At the outset, I should like to state that Secretary Johnson has authorized me to speak on behalf of the National Military Establishment in support of S. 857. As you know, this bill was introduced in the Congress before Mr. Johnson assumed his office, and it had the full support of Mr. Forrestal. Secretary Johnson concurs in Mr. Forrestal's position and desires that your committee be informed that he fully supports the uniform code.

In the hope of getting before you in a short form the essential features of the code, I have prepared a statement, but with your permission I will offer the statement for the record and try to give a summary of what I think would be the important features of the bill that would attract your attention most.

Senator KEFAUVER. We will be glad to have you do that, Professor Morgan, and the statement will be inserted in the record at this point.

(The prepared statement of Professor Morgan is as follows:)

THE UNIFORM CODE OF MILITARY JUSTICE

(Mr. Chairman and members of the committee.)

At the outset, I would like to state that Secretary Johnson has authorized me to speak on behalf of the National Military Establishment in support of S. 857. As you know this bill was introduced in the Congress before Mr. Johnson assumed his office and it had the full support of Mr. Forrestal. Secretary Johnson concurs in Mr. Forrestal's position and desires that your committee be informed that he fully supports the uniform code.

In the hope of putting before you in the shortest time the essential features of the code, I have prepared a statement. With your permission I will offer this statement for the record and will paraphrase it for you.

S. 857 which is the counterpart of H. R. 2498 on which the House Armed Services has recently concluded hearings is the result of an intensive study of the present systems and practices of the several departments or branches of the military forces, of the complaints that have been made against both the structure and operation of the existing military tribunals, of the explanations and answers of the services to those complaints, of the various suggestions that have been made for modification or reform and of the arguments of representa-

tives of the services as to the practicability of each proposal. In some instances we found helpful, information concerning the practices of foreign military establishments. Copies of data compiled by the staff of the committee under the direction of Mr. Larkin, assistant general counsel, Secretary of Defense, have been supplied for your use.

As you know, the committee that was appointed by Secretary Forrestal consisted of Assistant Secretary of the Army, Gordon Gray; Under Secretary of the Navy, John Kenney; and Assistant Secretary of the Air Force, Eugene Zuckert. I acted as chairman of this committee. We, of course, found many problems of complexity in our study of the Articles of War and Articles for the Government of the Navy. We found differences in nomenclature, organization, function, and procedures in the two statutes.

It was very gratifying to me that the committee achieved such a large degree of unanimity. There were only three issues on which there was not full agreement and these issues were submitted to Secretary Forrestal and his decisions were incorporated in the code. I believe Mr. Larkin has discussed the issues involved with you in executive session several months ago. A project of this kind, of necessity, represents the combined views of a number of people, and each and every participant partially compromised his views on a number of points. Therefore, the proposed code is not the product of one person, nor would it have all its present provisions if written by one person or by one department.

Our directive, which we endeavored to obey, was to create a code that would be applicable to all the armed forces—Army, Navy, Air Force, and Coast Guard—a code that would operate uniformly for the unified Military Establishment. We have also tried to phrase the code in modern legislative language and to arrange its provisions in orderly sequence, so that it would be understandable to laymen and to civilian lawyers as well as to men learned in military law.

The code is designed to supersede (*a*) the Articles of War including the amendments contained in the Selective Service Act of 1948, (*b*) the Articles for the Government of the Navy, and (*c*) the Disciplinary Laws of the Coast Guard. As you know, there are at present no separate articles governing the Air Force or the Marine Corps. If passed, the code will be the sole statutory authority embodying both the substantive and the procedural law governing military justice and its administration. There will be the same law and the same procedure governing all personnel in the armed services. That this should be so is the settled conviction of most people, and I believe no argument is necessary to demonstrate its validity.

In the same way that all persons in this country are subject to the same Federal laws and triable by the same procedure in all Federal courts, so it will be in the armed forces. The original trial of an accused will be in a court of his own service, except in certain circumstances where he is a member of a force acting jointly with another. The departmental review will follow a similar course. But the procedure before trial, at the trial, and on review will be the same as if the case had occurred in either of the other armed forces. The final review on the law will be made by the same tribunal for all the Departments of the Military Establishment. The objective is to make certain not only that justice be done to the accused but that there be no disparities between the services. A civilian lawyer will have no difficulty in conducting any case at any stage of the proceeding.

Inasmuch as a large portion of the code has its foundation in those two statutes, in many instances there is very little that is new in the uniform code except the language. There are a number of provisions, however, which were not heretofore contained in either the Articles of War or the Articles for the Government of the Navy and to which you will probably wish to give special consideration. By a brief summary of the contents of each part of the uniform code, starting at the beginning, I can indicate to you those articles which are incorporations of present provisions and practices, those which are incorporations of the amendment of last year to the Articles of War, and those articles which are new.

Part I of the code concerns itself with general provisions which are usually found in modern penal laws. This part contains, in addition to definitions, the general jurisdictional provisions of military law. There is little in this part which is entirely new.

Article 4, however, is a noteworthy change for the Army and Air Force in that it provides that, in cases where an officer is dismissed by the President without trial and in the event he is later exonerated, he may be restored to active duty. Article 6 extends to the Navy the provisions passed by the Congress at the last

session requiring assignments for duty of judge advocates and legal officers to be subject to the approval of the appropriate Judge Advocate General and requiring consultation by convening authorities with staff judge advocates or legal officers in matters relating to the administration of military justice.

Part II, which consists of articles 7 through 14, covers the general subject of apprehension and restraint. It is new only to the extent that the conflicting definitions of the terms used and the different processes have been simplified and made more orderly. Attention is drawn, specifically, to article 12, which continues the provision enacted by the Eightieth Congress in connection with confinement of members of the armed forces with enemy prisoners.

Part III consists of one article only—Article 15—which deals with nonjudicial punishment imposable by commanding officers. This is commonly called company punishment in the Army, and punishment at mast in the Navy. As you will notice, the article lists all the punishments now so imposable by both the Army and the Navy. The present practice of the Army differs from that of the Navy. The permitted punishments are different. The Army practice has been to impose less severe punishment and to give the accused an option to demand trial by court martial. The Navy has imposed somewhat more severe penalties and has given the accused no option. This diversity in practice is due to two factors: (1) Men on shipboard are necessarily in a different situation with reference to freedom of motion and availability of replacement than men in camp; (2) the punishment is imposed at mast by the captain, and a summary court consists of an inferior officer, while in the Army such an incongruity in rank between a commanding officer and a summary court would be virtually unknown. The committee concluded that these factors justified a difference in treatment. Consequently article 15, first, subjects the imposition of these nonjudicial penalties to complete regulation by the President, and, second, gives the secretary of each department discretionary power to put additional limitations upon them and to provide for an option to the accused to demand a court martial. One further provision of interest in this article is subdivision (d) which strengthens the present system of appeals from nonjudicial punishment and permits reviewng authorities not only to remit the unexecuted portion of punishment, but to restore rights adversely affected.

Part IV in its article 16 creates three classes of courts martial—general, special, and summary. These correspond to the present courts in the Army. The special court martial under present Navy practice is called a summary court, and the summary court is called a deck court. The chief difference from the present Army provision is the requirement that a general court shall consist of at least five members and a law officer.

Most of the articles consist of a rewording and revision of provisions found at present in both the Articles of War and the Articles for the Government of the Navy. Article 17, however, is new in that it provides reciprocal jurisdiction of courts martial. By its terms, each armed force shall have court-martial jurisdiction over all persons subject to the uniform code. There is thus provided authority for any Army court martial to try either its own personnel or the personnel of the Navy, the Air Force, or the Coast Guard. It is felt that this provision is necessary in the light of unification and by virtue of the tendency to have military operations undertaken by joint forces. Inasmuch as it is not possible at this time to forecast the different forms of joint operation which will take place in the future, the exercise of the reciprocal jurisdiction of one armed force over the personnel of other services has been left to the regulations of the President. In this way a desirable flexibility is attained which will enable the President to prescribe the types of operations in which reciprocal jurisdiction will be exercised.

Part V, which has to do with the appointment and composition of courts martial, includes articles 22 through 29. These fix the qualifications of the persons who may convene general, special, and summary courts, and the persons who may serve on courts martial. Article 25 provides for the service of enlisted men on courts which try enlisted men and follows the provision of Public Law 759 of the Eightieth Congress. Article 26 and article 27 deserve special mention. The former, which provides for a law officer on general courts martial, changes the practice of the Navy which has heretofore had no judge on its courts. It also changes the practice of the Army, which has had a law member, in that this official will now act solely as a judge and not as a member of the court, which becomes much like a civilian jury. The law officer will not retire with the court.

Article 27, which provides for the appointment of trial counsel and defense counsel, changes present Army and Navy law in that it makes it mandatory for each counsel before a general court martial to be either a judge advocate or a law specialist, or a person admitted to practice in the Federal or the highest court of a State, and to be certified by the Judge Advocate General as competent. Heretofore lawyers acted as counsel only if they were found available by the convening authority. The committee believes that the provisions of these two articles will tend to make the general court martial a more independent tribunal staffed by competent and efficient lawyers.

Part VI covers the provisions governing pretrial procedure and, in the main, the articles in this part follow present Army practice as prescribed in the amendment of 1948. The Navy practice of pretrial investigation is less formal than that of the Army. By the new provisions, both of them will be the same.

Part VII, articles 36–54, covers trial procedure and follows closely the present Army and Navy practices. A good many of the provisions, however, now make uniform a number of minor differences which have heretofore existed. Article 37 continues the provision passed by the Congress last year prohibiting unlawful influence on the actions of courts martial. The committee believed it most desirable to continue this salutary prohibition, which will do much to eliminate so-called command control. Article 41, which provides one peremptory challenge of members of general and special courts, follows present Army practice, but changes Navy practice, which heretofore had no provision for peremptory challenges. Another example of uniformity is found in article 51, which covers the question of voting and rulings. As set out by the provisions of the article, the law officer now becomes more nearly an impartial judge in the manner of civilian courts. In addition to ruling on interlocutory questions of law during the course of the trial, the law officer is now required to instruct the court, on the record, before it retires as to the elements of the offense and to charge the court on presumption of innocence, reasonable doubt and burden of proof. In article 52, you will notice that the number of votes required for both conviction and sentence have been made uniform for all the services.

Part VIII, articles 55–58, deals with sentences and has nothing now in it except an authorization to the respective Secretaries to make regulations for carrying into execution any sentence of confinement in any correctional or penal institution under the control of the United States. This was drafted after consultation with the correctional branches of the services and its purpose is to make available more adequate facilities for rehabilitation of offenders.

Part IX, article 50–76, provides for the appellate review of court-martial cases. It makes a number of innovations in which I am sure you will be interested. When the committee considered the whole subject of appellate review, it found that the present procedures of the Army and Navy differed widely. The Army system is exceedingly complex. To the review by the convening authority and the board of review, further review was added last year by Congress by a judicial council composed of three general officers. The course of review for several types of cases is painstakingly spelled out in the Articles of War by reference to and in conjunction with the respective functions of approving and confirming authorities, and is difficult for the uninitiated to diagram or understand. In studying this system, the Navy felt that it was wholly impracticable for its operations. The Navy system of review, on the other hand, is far more informal and, in the main, rests ultimately with the Secretary of the Navy. It provides a review by the convening authority, a review in the office of the Judge Advocate General, and an additional review on sentence by the Bureau of Personnel and by a sentence review board. The action of all these agencies, however, is advisory only. The Army thought this system unsuited to its needs. The committee felt obliged to devise a system that would be useful and practical for all services, and would be consonant with the plan of unification.

In essence, the appellate review proposed in the Uniform Code is as follows: There is an initial review by the convening authority covering law, facts, credibility of witnesses and a review of the sentence. In this respect, it is in all essentials the same as the first review provided at the present time by both the Army and the Navy. Insofar as the convening authority has affirmed a finding or sentence against the accused, a review is provided by a board of review in the Office of the Judge Advocate General of the Department of which accused is a member. This board of review is a counterpart of the present board of review of the Army. As the amendment of 1948 provides, it reviews the record of the trial for law, facts, and sentence. To this extent, the Navy system is changed. Following this review, there is a review for errors of law by a single

Judicial Council, composed of three civilians. It is apparent that such a tribunal is necessary to insure uniformity of interpretation and administration throughout the armed services. Moreover, it is consistent with the principle of civilian control of the armed forces that a court of final appeal on the law should be composed of civilians. With your permission I will not stop to spell out further the many details of this system. I should prefer to postpone further explanation of it until you take it up formally and in detail. At that time, we can show you some charts of this system and its comparison to the present Army and Navy systems. They will, I think, help you to visualize the whole problem.

Part IX also provides in article 70 for appellate counsel to assure that the parties will be adequately represented before the boards of review and the Judicial Council. They shall be appointed by the Judge Advocates General with provision for the accused to have his own counsel. Article 72 provides for a hearing before the suspension of a serious sentence can be vacated. Both of these articles are new.

Part X covers punitive articles. In the main, the present punitive articles of the Articles of War and the Articles for the Government of the Navy are retained. There are, however, several interesting features of the present punitive articles. In the first place, we have set forth some general provisions normally found in modern penal laws and not heretofore contained in the Articles of War or the Articles for the Government of the Navy. These cover the definitions of a "principal," "an accessory after the fact," "attempts to commit crimes," "conspiracies" and "solicitations."

You will notice as you study the punitive articles that we have consolidated a number of them in the same fashion as we have consolidated a number of other provisions throughout the rest of the code. An example of this is the crime of desertion, which is now contained in article 85. The same material was heretofore found in Articles of War 28 and 58 and in Articles for the Government of the Navy 10, 4 (par. 6), and 8 (par. 21).

In addition, we have made specific several offenses which were previously punishable under the general articles. One of them we designated as "missing movement," which is contained in article 87. This is an aggravated type of absence without leave and is designed to meet conditions encountered in World War II. The experience of World War II indicates that a large number of military personnel who were legitimately on leave or who left without permission returned after their unit or ship had moved or sailed. This misconduct caused so much trouble that it was felt necessary to make it a subject of a specific article. Article 105, entitled "Misconduct as Prisoner," is also new and provides for punishment of anyone subject to the code, who while in the hands of the enemy in time of war, either for the purpose of securing favorable treatment for himself or while in a position of authority, mistreats others who are confined with him. You will recall that a number of instances of this type came to light after the war. They justify the enactment of this specific offense.

The last part, namely part XI, contains a number of miscellaneous articles such as those regulating the procedure before courts of inquiry, those providing for authority to administer oaths, and for complaints against superiors, and for redress for damage done to private property by members of the armed forces.

One important concern of the committee throughout its deliberations was the position of military command in the court-martial system. Secretary Forrestal, in his precept to the committee, instructed us to draft a uniform code, to be uniform in substance and uniform in interpretation and construction, which would protect the rights of persons subject to the code without undue interference with appropriate military functions. It was recognized from the beginning by the committee that a system of military justice which was only an instrumentality of the commander was as abhorrent as a system administered entirely by a civilian criminal court was impractical. We had before us, as I have told you, studies made by various committees in the past and also the testimony presented to this committee in the last Congress. We were aware of the criticisms which had been made against the court-martial system and the defenses that have been put forward in its behalf.

We were convinced that a Code of Military Justice cannot ignore the military circumstances under which it must operate but we were equally determined that it must be designed to administer justice. We, therefore, aimed at providing functions for command and appropriate procedures for the administration of justice. We have done our best to strike a fair balance, and believe that we have given appropriate recognition of each factor. Because of the military nature

of courts martial, we have left the convening of the courts, the reference of the charges, and the appointment of members to the commander. For the same reason, we have preserved the initial review of the findings and the sentence by the commander. Having done this, we examined ways and means of restricting the commander to his legitimate functions. We have tried to prevent courts martial from being an instrumentality and agency to express the will of the commander. To make the action of courts martial and the procedure for review free from his influence we have set up an impartial judge for the court martial, made it mandatory that lawyers represent the parties in the general court-martial cases, required the commander to consult before and after trial with his staff judge advocate or law specialist, and prohibited him from either censuring or reprimanding the court. We have set up a system which resembles the independent civilian court, but we have placed it within the framework of military operations.

At the trial and in the review of facts the men who function as counsel, trial judge and intermediate appellate judges will be skilled in law and in military matters. They will be independent of command and subject to a supreme civilian tribunal on questions of law.

I am aware that there are many schools of thought on military justice, ranging all the way from those who sponsor complete military control, to those who support a complete absence of military participation. I do not believe either of these extremes represents the proper solution.

In closing my formal remarks, I would like to state again that I strongly support the uniform code and urge its approval by the Congress.

The code as submitted is not exactly what any one of us would have drawn had he been alone and starting without precedent. Many of the provisions on which there was unanimity were compromises. I support all these unanimous decisions, and I also support the decisions made by Secretary Forrestal.

If you have any questions on any of the articles, I shall be glad to try to answer them.

Mr. MORGAN. As you probably know, this uniform code is a code for the three services, the Army, the Navy, and the Air Force, and it takes the place of the Articles of War, the Articles for the Government of the Navy, and the Disciplinarian Laws of the Coast Guard.

The Marine Corps, as you also know, had no sepaarte articles, they were a part of the Navy; and as you know, also, the Air Force, up to this time, had no separate articles of war. They were governed by the same articles of war as the Army.

The Navy, however, had a distinct code called the Articles for the Government of the Navy, and the procedure was somewhat different from the procedure in the Army. The provisions were somewhat different.

You probably are aware of the study which we made. You will see the material which was prepared by the working group, which took each article of war, and then for each article of war followed that by the corresponding provision of the Articles for the Government of the Navy; and, also any difference in the Coast Guard provisions.

Furthermore, all the amendments that have been made by the Elston bill of the last Congress, and all the suggestions that have been made or changes by the various investigating groups that had investigated the operation of military justice during this past war—the working group then under the supervision of Mr. Larkin considered every one of those matters, and considered the differences and had representatives of the legal departments of the various services there, to try to iron out any differences existing, and to see what kind, if any, of agreement could be reached.

As a result of those working group conferences, some of which I participated in, but all of which Mr. Larkin superintended and followed very closely, there would be a draft of a provision made, and

that draft would be submitted first to me, and then to the whole committee.

Senator KEFAUVER. Professor Morgan, this is Senator Saltonstall.

(Senator Saltonstall resumed his seat at the committee table.)

Mr. MORGAN. As I was saying, the draft would be submitted to the whole committee and thoroughly discussed, and very frequently——

Senator KEFAUVER. Excuse me just a second.

(There was discussion off the record.)

Senator KEFAUVER. All right, Professor Morgan.

Mr. MORGAN. Very frequently the changes would be suggested and the matters sent back for redrafting. Then, the redraft would be considered until we finally got the particular article in the form in which it satisfied the whole committee, or at any rate, in the form which the committee was willing to accept.

When we finally drafted the code, article by article, in that way, then we want over the code as a whole; so, I can assure you, Mr. Chairman, that we considered thoroughly every article in the proposed bill, and I am not saying of course that we were unanimous on all these things, but there was a remarkable degree of unanimity.

There were two or three points on which we had a division of opinion, and they were submitted to Secretary Forrestal, and Secretary Forrestal made the determination, and of course as you may imagine, a number of the provisions which we submitted were the result of compromise, after long discussion.

You might expect that sort of thing with an outsider like me coming in, who had certain ideas about military justice, and some of them a hand-over of World War I.

Senator SALTONSTALL. Off the record, please.

(There was discussion off the record.)

Mr. MORGAN. Now, if this code is adopted, we will have the same procedure and the same substance governing all the services, and with a final authority as to the law, which is an authority for all three—a single, final authority.

I think perhaps if I go through the procedure for a trial, and—I might say an accusation and a trial—it will give you an idea of the system that the bill sets up.

First, the charges which are made against the accused have to be sworn to by a person, subject to military law. Then, there must be a preliminary investigation, and at that preliminary investigation the accused is entitled to be present and to cross-examine all available witnesses, and he has a right to be represented by counsel.

The committee of the House added a provision that he had to be informed also that he had a right to be represented by counsel.

When the investigation is completed, if it is to be used as a basis for a trial, the investigation goes to the convening authority. The convening authority must consult with his staff judge advocate before he orders a trial. It does not mean that he must necessarily follow the advice of the staff judge advocate. He may disagree with him, but he has to take the staff judge advocate's advice before he orders it for trial, and has to be convinced that an offense has been committed, and that there is a good case against the accused on the evidence that is indicated, although it may not be fully set forth in the investigation.

The court, and I talk now about the general court, is composed of not fewer than five officers and a law officer. If an enlisted man is the accused, he has the right to demand to have at least one-third of the court enlisted men. The law member must be a man who is admitted to practice in the highest court of a State, or in the Federal courts, so he has to be a lawyer. He is not a member of the court in the sense that he is one of the five who passes upon the guilt or innocence of the accused.

There must be appointed trial counsel and defense counsel for each general court, and the trial counsel and defense counsel must be either members of the Judge Advocate General's office, or its equivalent in the Navy, the legal specialist, or a member of the bar, and he must be approved by the Judge Advocate General as competent to perform that particular job, just as the law member must be approved by the judge advocate as competent to act as the law officer, rather than law member.

Now, the law officer really acts like a judge. At the trial, the accused is entitled to one peremptory challenge. Heretofore, the Navy never had a peremptory challenge. The Army has had a peremptory challenge, as I remember, since 1921, under the Chamberlain bill. There may be any number of challenges for cause. There is no limit on that.

Now, these challenges for cause are decided by the court, and if there is a tie vote in the court on a challenge for cause, the challenged person is disqualified.

For procedure and evidence——

Senator KEFAUVER. Professor Morgan, before you get to that, how is the court selected under this bill?

Mr. MORGAN. The court is selected by the convening authority, and there is a group of articles which provide who may convene courts martial. It is not essentially different from the present system.

I see what you have in mind, I think, Mr. Chairman. If I may postpone my remarks on the question of command control, I could outline the set-up to you, and then tell the functions of the different persons; in fact you see what I am trying to emphasize now, is that at the trial of a general court martial, the people who are really in control are lawyers, legally trained people. That has not had to be the case in the past.

There was a provision that they should be lawyers if available, but that "if available" was a way out, and very frequently, if not generally, they were not "available" and—off the record.

(There was discussion off the record.)

Mr. MORGAN. The procedure and evidence, rules governing procedure and evidence, may be prescribed by the President, but they must not be contrary to the Federal Rules of Criminal Procedure, and must conform, as far as possible, to the rules that are in effect in the district courts of the United States.

Now, at the trial, the rules on interlocutory motions are made by the law officer who acts as a judge, and the only interlocutory motions on which his ruling is not final, so far as that court is concerned, are on motions for an acquittal, a directed verdict as it would be at common law in the civil side; and a motion to practically acquit on the grounds of insanity.

Of course, at common law, or under common law, you know the judge would direct a verdict if there was no evidence sufficient to support the findings, but we don't give this law officer that much authority, and I think you will see why, on the basis of the review that is provided.

When the evidence is in and before the court retires, the law officer charges the members as a jury is charged. He must charge the court on the elements of the offense, on the burden of proof, and the presumption of innocence. He must cover at least these points so that he acts like a judge, and the court is in fact, just like a jury.

On the findings, and I may say that the law officer does not retire with the court, but after the court has made up its mind on findings, they may call in the law officer to put those findings in proper shape; but whatever goes on at that conference must be included in the record of the trial, so that if he goes back for that purpose, he has to take the reporter with him so that you get a verbatim report of that.

A finding of guilty of an offense punishable by death must be unanimous, and other offenses may be found by a two-thirds vote. On the sentence, a sentence of death requires unanimity; a sentence for 10 years or more in confinement requires a three-fourths vote; and, on the others a two-thirds vote. That is uniform, now, for all the services. It wasn't before, and all voting must be by secret ballot.

That was introduced, as you probably remember, to begin with in the Chamberlain Act.

The first review, when the record is made up—the first review of the case is made by the convening authority. He must submit the record to his staff judge advocate, and the staff judge advocate must write an opinion on it and that opinion becomes a part of the record, or, it goes with the record.

The convening authority may take any action which favors the accused. He cannot take action which would increase the penalty or require a reconsideration of a matter which would be against the interest of the accused. He has full clemency power, so that he can do what the Army usually calls "bust" the case, if he wants to at that particular stage.

Insofar as he approves as sentence, then the record goes to the board of review of the appropriate Judge Advocate General's office, the Judge Advocate General and whichever one of the particular services may be involved, that is, the Air Corps, the Navy or the Army.

Senator SALTONSTALL. Professor, who has the right to "bust" the case, as you say?

Mr. MORGAN. The convening authority, the man that convenes it. That is, he is the purely military man. He may have no legal training at all. His staff judge advocate will usually have legal training and he has to ask the advice of the staff judge advocate. There again, he does not have to follow the advice, but the advice of the staff judge advocate becomes a part of the record so that it will thereafter go up with the record.

In each Judge Advocate General's office there is set up a board of review which is composed of at least three officers——

Senator KEFAUVER. Professor Morgan, will the court in every case be officers in the same branch of the service, or men in the same branch of the service?

Mr. MORGAN. Normally, yes; but, there is a provision for reciprocal jurisdiction. The President is authorized to make regulations for that, to take care of joint operations. You see, there are a great many cases where the Army, the Navy, and the Air Force cooperate, and if the situation is such that it would be manifestly convenient to try, for example, an Air Force officer by an Army court martial, and so forth, or by a Navy court martial, he could be tried under regulations issued by the President.

We thought there would be too many varying situations for us to try to set out in legislation the particular sort of instances where that would be proper, but now, suppose that an Army court martial does find a Navy man guilty The convening authority of course would have the power to bust it, but it would go up to the departmental review board in his own service. It would go to the Judge Advocate General in the Navy, if it were a Navy man who was accused, and who had been convicted.

Does that answer your question?

Seantor KEFAUVER. Yes.

May I ask at this point, was there any difference of opinion on the part of the committee or extensive discussion as to whether each service should have its own reviewing section?

Mr. MORGAN. No; the committee was unanimous on that, so far as the board of review is concerned.

The notion was that each service would know more about the customs of the service, and all that sort of thing, and that the Judge Advocate General of that particular service would be the man that would be most competent to handle that thing from the point of view of this board of review, because the board of review, now, has very extensive powers. It may review law, facts, and practically, sentences; because the provisions stipulate that the board of review shall affirm only so much of the sentence as it finds to be justified by the whole record. It gives the board of review, as the Elston bill did, the power to review facts, law and sentence, and to judge the credibility of witnesses and to make new findings which, insofar as they may be in favor of the accused—they cannot increase anything that was done in the sentence or by the sentence which is being reviewed.

Senator KEFAUVER. Does the Marine Corps have separate reviewing officials?

Mr. MORGAN. I beg pardon?

Senator KEFAUVER. Is the Marine Corps reviewed by the Navy Judge Advocate General?

Mr. MORGAN. That is the Navy, it is part of the Navy during war, and is made a part of the Navy now, by the National Defense Act, as I understand.

Senator SALTONSTALL. It always has been.

Mr. LARKIN. Yes, but sometimes it was under the jurisdiction of the Army when it was serving with the Army.

Mr. MORGAN. That is right. The Marine Corps didn't like it, but that is true.

Senator SALTONSTALL. That is the final review of facts?

Mr. MORGAN. That is the final review of facts; yes, sir.

Senator KEFAUVER. Can a sentence be increased by the reviewing board?

Mr. MORGAN. It can be decreased, but not increased.

Now, when the board of review determines what should be done, the Judge Advocate General has to send the case back to the convening authority with directions to take the actions which the board of review says should be taken.

The Judge Advocate General has no power to disapprove a finding of the board of review. He does have power, however, to ask that the case go to what we call the Judicial Council, but which the House bill calls, much more accurately, the Court of Military Appeals.

Now, this kind of review takes place for every sentence for a year or more, every sentence, every case where the penalty or sentence is as severe as a year's confinement or more, or where a dishonorable discharge or bad conduct discharge is imposed.

At the top, is the Court of Military Appeals, or Judicial Council, with power to review on matters of law. This court is composed of civilians, three civilians who have to be lawyers, members of the bar of a court of the highest court in a State, or the Federal courts, appointed by the President during good behavior, and receive the emoluments and so forth of a judge of the circuit court of appeals.

Senator SALTONSTALL. Mr. Chairman, may I ask:

Why do you have them sit "for good behavior"? Why would it not be better to have a term of years?

Mr. MORGAN. Well, my notion Senator—of course, that is the notion of the House committee. Our committee, frankly, was in dispute on this.

What the House committee did is what I personally think ought to be done. I think they ought to be put squarely on the same basis as circuit court of appeals for the United States.

Senator SALTONSTALL. That is, for good behavior?

Mr. MORGAN. For life, during good behavior.

Senator SALTONSTALL. My only thought was, this is a new type of court, an experimental thing to a certain extent, and the first men you put on it may not be the ones that would be so qualified. On the other hand, if you have got it for a term of years, you will never get it for good behavior.

Mr. MORGAN. That is right.

Senator KEFAUVER. Did you say the House changed the recommendations?

Mr. MORGAN. Do you want the inside of this whole business?

Senator SALTONSTALL. You have reporters here, you want to remember that.

Mr. MORGAN. This is off the record.

(There followed discussion off the record.)

Mr. MORGAN. I don't want to do anything that appears to violate any of the confidence of the committee, and I don't want to represent the committee, I no longer represent the committee, I am representing the Secretary of Defense. The committee is practically discharged.

Do you want the history of the matter?

When it got to the Secretary of Defense and conference with the Bureau of the Budget, the point was made that the appointment ought to be made by the President, confirmed by the Senate, and it ought to be just like a circuit court of appeals judge, and Mr. Forrestal

agreed with that and that is the way the bill came to the House, and the appointment was to be by the President, but he did not insert the terms or anyhing of that sort, although the talk was that it ought to be like a circuit court of appeals judge.

So, that is the point on which there was the chief difference, Senator Saltonstall, in the committee.

Senator SALTONSTALL. The chief difference as to whether or not there should be a judicial conference?

Mr. MORGAN. First, there should be a Judicial Council, and the vote of the committee, committee of four, was three to one on that, and Secretary Forrestal went with the majority, you see.

The committee did not consider fully the question of what should be the case if the President were to appoint.

Senator SALTONSTALL. Am I not right, Professor, on all this code, the biggest difference of opinion comes on this question on whether or not there should be a Judicial Council?

Mr. MORGAN. That is right; on a Court of Military Appeals. That is the chief difference. There was some difference as to whether or not there should be enlisted men on the court.

Senator SALTONSTALL. In other words, the question was whether, in a Code of Military Justice, there should be a final decision left in civilians on the errors of law?

Mr. MORGAN. Yes; on errors of law. We all agreed that fact ought to end with the Board of Review in the Judge Advocate General's office. We all agreed on that, and we thought that was a wise thing, because in handling these questions of fact, particularly, the military men will be much more acquainted with the situation than the ordinary civilian would be.

Now, you will note, however, that there is a provision that the Board of Review may consist of officers or civilians, and that was put in because the Coast Guard said, particularly in time of peace they had in their reviewing office some trained lawyers that very frequently they might want to use on the Board of Review. The Navy also indicated that it might be willing to do that in unusual cases, although in time of war they all agreed that practically all those people would probably be commissioned officers.

In this Court of Military Review there is an automatic appeal to that board, and an automatic review in all cases of death, or all cases affecting a general officer.

Furthermore, the Judge Advocate General can send any decision of a Board of Review to the Court of Military Appeals.

Senator SALTONSTALL. Dr. Morgan, if you will excuse me—Mr. Sims, while we are considering this, it just flashes through my mind, this code certainly ought to be brought in line with this bill we are considering now, these changes about a military department as opposed to an executive department, if it comes to that at all.

Professor, we have another bill before this committee changing the statute which, if enacted into law, would change the status, and we would only have one executive department. I don't know whether that would apply here or not.

Mr. LARKIN. We considered it briefly, Senator.

It is our opinion that the way this code is drafted, it would apply with the present organization of the National Military Establish-

ment, or with the changes that are contemplated; so, I do not think it would be inconsistent with the present or proposed provisions, and we didn't try to forecast or speculate what the new system might be.

Senator SALTONSTALL. That just flashed through my mind.

Mr. LARKIN. We have been conscious possibly and have screened the bill.

I would be happy to go over the bill with Mr. Sims and look at it again, but I think there are no provisions in it which would be inoperative, or inconsistent with the proposed change.

Mr. MORGAN. Possibly you might have some titles to change, or something like that.

Mr. LARKIN. I think that as it is presently set up, it makes no difference whether it applies to an executive department or not.

Mr. MORGAN. On the sentences other than death, or those affecting a general officer, and where the Judge Advocate General does not ask to have the case reviewed, it will be reviewed on petition of the accused, which is like a petition of certiorari, if the accused can show good cause why it should be reviewed for questions of law.

There is set up also in the Office of the Judge Advocate General, Government appellate counsel and defense appellate counsel, and these men must be qualified lawyers, and the defense appellate counsel must appear before the boards of review, or the Court of Military Appeals in behalf of the defense, at the request of the accused, if the accused requests it, or if the United States, that is, the prosecution is represented by counsel, and in all the cases where the Judge Advocate General requests the record to be reviewed by the Court of Military Appeals.

There still remains, of course, in the several secretaries and the President, the power of clemency. In cases where there is a sentence for less than a year, you have the same kind of review provided in the Judge Advocate General's office, which is now provided—that the record is reviewed by a single officer; but, it is provided now that, by the bill, if the single officer finds any error in the record, prejudicial error, then there shall be a review by the board of review just the same as in the cases of the more serious offenses.

On the question of restriction of command control, we felt that when the board of review in the Office of the Judge Advocate General, which is so far removed from any control of the convening authority, had power to handle law, fact and sentence, that that eliminated a great part of the evils of command control. We also included a prohibition which was put in the Elston bill against any censure or attempt at influence by the convening authority, upon members of the court, or any of the persons who were connected with the administration of justice, and make it a military offense for anybody to attempt to use improper influence with members of the court or with the reviewing authority.

Senator SALTONSTALL. Let me ask you a question that may show great ignorance, but I would be interested to know:

Would the judicial council be entitled to consider, as a question of law, that the sentence was excessive, or—is that a question of fact?

Mr. MORGAN. It would be, I suppose, if the sentence was so excessive that they could say it was outside of all discretion. I suppose

the court might say that that would be a question of law; but, you see the board of review would probably catch that. If the sentence was excessive, the board of review would reduce it.

You mean, would that be a question of law?

Senator SALTONSTALL. Yes.

Mr. MORGAN. You know, as well as I do on that, that that would be a very close question. It would have to be extremely excessive.

Senator SALTONSTALL. Why that popped into my mind was that if you are going to have a judicial council composed entirely of civilians, after going all through the military channels to make sure that everything is fair, and that the accused has had as fair a process as possible, I was wondering why they should not consider the facts, as well as the law?

Mr. MORGAN. We thought that first, in almost every case, the board of review would take care of any excessive sentence; and, second, that the secretaries, and usually this means a particular under secretary who is a civilian, would doubtless exercise his clemency if the sentence was too severe; of course, if the sentence was one that was not authorized—you understand, although practically all the penal articles say that the sentence shall be such as a court martial may adjudge—the President does, as a matter of fact, put limits by regulation upon the sentence for specific offenses.

I know, I think I know what you have in mind. Most of the discontent, both after World War I and World War II, has been with excessive sentences, rather than with the fact of guilt or innocence.

I happened to sit on the clemency board after World War I for 6 weeks, and I happen to remember we remitted 18,000 in 6 weeks.

As a matter of fact, there has been, after each war, a Board of Review.

Mr. Larkin was vice president of a special board passing on cases in the Navy, and they were remitting a lot of excessive sentences.

Senator SALTONSTALL. Excuse me for interrupting. Perhaps you had better finish your procedure first.

Mr. MORGAN. On the question of elimination of command control, we have thought it was well enough to leave with the convening authority at present the appointment of the court and the officers as long as you have this kind of a review, and as long as you have lawyers in control of the trial, and a prohibition against any attempt to influence them unduly. You probably know, Senator, about the complaint about the so-called skin letters that went out, and so forth. That is all especially prohibited in article 98 of the new code. We make that a military offense.

Now, that completes my review of the system, and if you desire, I can give you briefly a summary of the different parts of the code. We divide it into 11 parts, as a matter of fact. We not only tried to make the code uniform, but we also tried to put it in modern legislative language.

The first part of it has only two articles in it that are probably worth noting, article 4 providing that an officer dismissed by the resident without trial, may, under circumstances after exoneration by trial, be restored to active duty.

We also put in there the provision that the Elston bill embodied, namely, that the assignments of judge advocates and legal officers should be subject to the approval of the Judge Advocate General.

Part 2 just includes the matter for apprehension, restraint and confinement, and includes the Elston bill's provision that there shall be no confinement of a soldier or officer with enemy prisoners, or in contact with enemy prisoners, or in contact with foreign nationals.

Part 3, which has to do with punishment, the Army calls it company punishment and the Navy calls it "at the mast." That is, nonjudicial punishment. There was a place where we felt that you might, by regulation, have some differences between the Army and the Navy. We did provide that in each case there should be an appeal to the next superior officer and then we provided that the Secretary might put further restrictions on the company punishment, or the mast punishment by regulation and they might provide for a refusal of the accused to take nonjudicial punishment and ask for a trial by a summary court.

Article 4 just sets up the three courts martial, the general, the special, and the summary. In the Navy, before this bill, the three courts were general, summary, and deck courts. Now, we have changed the name of deck court to summary court, and changed the name of the summary court to a special court, so you have the same set-up; and, as I explained it to the chairman, there is a provision for reciprocal jurisdiction.

The fifth part relates to the appointment and composition of the court martial. The new part is, of course, the mandatory provision for the law officer and for the lawyers as counsel.

Part 6 is the pretrial procedure which I have gone into.

Part 7 is the part which has to do with the trial, and it includes the prohibition against censure, and it provides a uniform method of voting on rulings.

Part 8 has to do with sentences, and the article that is new, is one that was drawn up in conferences with the correctional departments of the Army, Navy, and Air Force. It allows confinement in any institution under the control of the United States, and that was drawn up also in connection with the officers who have penological aspects of these confinements.

Paragraph 9 is the review which I have gone into.

Part 10 is the punitive article, and in the punitive articles we have tried to bring them into line with modern notions of criminal statutes.

Under the old articles, as you probably know, a number of crimes were simply mentioned by their common-law names. Rape was not defined. Burglary was not defined, and so on and so forth. We tried to define all these specific offenses.

You will probably be interested to know that a United States district court in Hawaii, in a rape case, ordered the defendant turned loose because the Navy Articles for the Government of the Navy do not make rape a crime, specifically; and that the prosecution of them under the general articles for the conduct that is detrimental to the service, and so forth, is altogether too vague and indefinite a provision to cover rape, so they turned the fellow loose on the rape charge. I suppose that will be reviewed, otherwise, but we have checked a number of such things as that by defining offenses of this sort and leaving the general article pretty much only for military offenses.

We have made specific two matters that caused a good deal of trouble during World War II. One was the so-called missing movement, a fellow would miss his ship and it would be aggravated a. w. o. l., of course, and we made that a specific offense; and then we made one a specific offense out of mistreating, that is, the mistreating of prisoners by a member of the United States military forces who is himself a prisoner, and has been put in charge of prisoners in a prison camp.

I think that is all I want to say about the code, Senator.

Senator SALTONSTALL. Professor, there are just two or three questions I would like to ask, and then I think that when the chairman gets back, perhaps he will have some.

Let me ask you this general question, first:

If there is not a Judicial Council, or Court of Military Appeals, and that is stricken from the bill, what would be your recommendation as to how the errors of law could be determined? I bring that out because that is the argument.

Now, assume our committee, we will say, wanted to strike from the bill the civilian end of the appeals on errors of law. What would be your recommendation? I am asking you now, as an expert who has studied the subject, as a lawyer and professor. How could we cover that situation?

Mr. MORGAN. Frankly, Senator, I don't see how you are going to cover it.

Senator SALTONSTALL. How is it covered now?

Mr. MORGAN. Except by saying that review on the law within the Judge Advocate General's Office is final, and you might do what the Elston bill did, to say that when the Judge Advocate General and the Board of Review agree, that will settle it. If the Judge Advocate General disagrees with the board, then you go and send it to the appropriate Secretary for action by the President; but that seems to me a hopelessly inadequate routine.

Senator SALTONSTALL. In other words, in your opinion this board of three civilian lawyers and judges, if it is eliminated, you would make the final decision rest in the board of review on facts as well as law, and if the head Judge Advocate General disagreed, then there would be, we will say, an appeal or further right of review in the Secretary of the Army?

Mr. MORGAN. That is what they do now. I think it is entirely unsatisfactory, and I think particularly it is very unsatisfactory to have the Judge Advocates General veto the board of review, particularly if the board of review is unanimous. There have been cases in the past where the board of review has said the record is too bad to stand up, and the Judge Advocate General said it will stand up. It didn't have to come back. It would go to the commanding officer in the field and he just followed the Judge Advocate General, and when you got your clemency review afterward, if you had to wait for that, they would wipe that thing out.

In my opinion, Senator, you are not going to get a situation that will satisfy the criticisms that are leveled at this whole system of military justice unless you do have a civilian court at the top. You have got to have it. The whole notion of the administration of military justice begins with the idea the Army, particularly, I am speaking

of now, because I was acquainted with it, had at the beginning of World War I, and that was, that in essence, a court martial was nothing more than a committee to advise the commanding officer what to do, as a basis of discipline; and that idea, of course, came down from the notion that your Army was all composed of professional soldiers and they knew that they threw away all their civil rights when they joined the Army. Most of them were mercenaries to begin with, and then we just adopted that kind of a system and kept on just modifying it.

I don't know whether you are acquainted with the rows that occurred when General Ansell——

Senator SALTONSTALL. Excuse me. Off the record.

(Discussion off the record.)

Mr. MORGAN. It seems to me also, Senator, as Mr. Larkin reminded me, if you are going to do that, you would at least have to have a central military authority, so as to get uniformity of interpretation.

Now, if you will notice this bill, our Court of Military Appeals, which we call the Judicial Council, has another function to perform, and that is, it meets at least once a year with the three Judge Advocates General and reviews the operations of the three services in the enforcement of the Code of Military Justice during the year, and the services, according to the House bill have to report the number of cases pending, the number of cases disposed of, and other data, so that this Judicial Council can recommend changes and so forth.

Now, it seems to me it is especially important that you should have the civilians there, and as I was saying to you, this notion that the court martial is really just a committee to advise the commanding officer what ought to be done by way of discipline—of course, that is going by the board. There is no doubt about that. Everybody concedes now that there is a big element of administration of justice, so that you have to have what we would call a fair trial with reference to the matter, or the semblance of a fair trial.

Senator SALTONSTALL. In other words, your answer to that question is that unless you have this final Court of Military Appeals you are not really carrying through the whole principle of justice as we know it in our system of courts and system of life here in the United States?

Mr. MORGAN. That is my point, Senator. We recognized that this is a combination of administration and justice and discipline. In our opinion there is just no question that you cannot ignore the disciplinary aspect of the thing, but we feel that by the system we have set up, we have made a fair compromise of the thing and we are also insistent that when you have an Army that is composed of citizens, and who are drafted and particularly if you are going to have a draft during peacetime, you have got to have morale at home as well as morale in the Army; and that, unless our citizens believe that a man, when he is charged before a court martial, is going to get the same kind of a square trial that he would get in the United States district court if he were charged there, then it seems to me you are going to have this constant dissatisfaction, this constant agitation against the Army and Navy and Air Force for the way they treat their men when they are charged with offenses.

Senator SALTONSTALL. May I bring up, Mr. Chairman, one question? I brought this up to Mr. Larkin, before.

Professor Morgan, I sent this bill to a friend of mine who had sat on many of these clemency cases, so called, and who is a very brilliant lawyer. He brought up to me the question of constitutionality of article 117, which is Provoking Speeches and Gestures.

Mr. MORGAN. Yes?

Senator SALTONSTALL. And he says this, in one paragraph:

> My final objection is that the subject matter is too vague and indefinite to be made a distinct military offense. While we can readily conceive of outrageous conduct in the form of words and gestures, the proposed article is all-inclusive and embraces much that is trivial, but which nevertheless could be contended to fall within its scope. I have had no luck in putting my hands on the decisions in the limited time I have had. A case in our court where we did not have to face the question because of a preliminary question of construction, is *Commonwealth* v. *Lombard* (321 Massachusetts 294).

And, he goes on to say:

> I wonder whether we need the proposed article anyway * * * because I believe it is covered in article 88, article 89, and article 91.

Now, without going through the rest of the letter——

Mr. MORGAN. I may say, Mr. Larkin and I felt that the latter part of that statement was applicable until we talked with the members of the service, and the members of the service said that that enabled them to point out to men who would be engaged in horseplay or provoking gestures, as you call it, matters which you might think would lead to riot or disorder, that they could point that out to them that "Here you are, commiting a specific offense," and the fellows desist easily. Otherwise, if you say, "Well, this is contrary to the general articles for good order, and so on and so forth," you would have a hard time.

Senator SALTONSTALL. Nothing would be hurt if the article was left out, would it?

Mr. MORGAN. I wouldn't believe that I would grieve too much if that was left out. I am sure of that, personally, but I think the constitutional point is just no good. If you ask me, I think there is absolutely nothing to that "provoking gestures" and so on and so forth by men in the armed services toward each other, it is quite typical to provoking language and gestures to men on the street, and so forth.

Senator SALTONSTALL. Suppose we have a civilian employee over in the Pentagon, and he makes a provoking gesture or something that would come within this article.

Mr. MORGAN. I suppose he is outside the code, under the provisions for jurisdiction.

Senator SALTONSTALL. This would apply to him.

Mr. MORGAN. That is the way I would see it. If you are going to try to apply it to civilians, that is one thing, of course. The same thing could be said, could it not, Senator, about the disrespectful language concerning officials of the Government?

Senator SALTONSTALL. Off the record.

(Discussion off the record.)

Senator SALTONSTALL. Mr. Chairman, might I ask one more question which may not be pertinent, but which would be very illustrative and helpful to me? This Mrs. Ybarbo, who is a Massachusetts citizen whose troubles I followed pretty closely, she was tried by a German civilian court, was she not?

Mr. MORGAN. I supposed she was tried by a court of the military government over there.

Senator SALTONSTALL. What I was curious about was—she was sentenced to a very strong sentence.

Mr. MORGAN. She was.

Senator SALTONSTALL. Whether right or wrong, I don't pretend to judge, but then General Clay of the military command came along and pardoned her entirely. I think he rendered justice in a set of facts that, as I saw them—that was pretty much justice.

Now, what I was curious about was, that was conducted under the present laws, and under this code, if it was in effect, her lawyer would have had to have appealed on error to this military——

Mr. MORGAN. As a question of law; yes.

Senator SALTONSTALL. On a question of law?

Mr. MORGAN. Yes.

Senator SALTONSTALL. On the other hand, on the question of fact, the reviewing board over there, of military people, she being part of the Military Establishment, being the wife of a sergeant, would have the final questions on fact.

Mr. MORGAN. Oh, yes; the final questions on fact, but that would not prevent the convening authority from busting the whole case, if he wanted to.

Senator SALTONSTALL. Down one step below that?

Mr. MORGAN. Yes.

Senator SALTONSTALL. So that General Clay could have, as the convening authority, before it reached the military review, have busted the whole case on fact.

Mr. MORGAN. Absolutely, yes.

Senator SALTONSTALL. But, if he didn't, then the——

Mr. MORGAN. Then the board of review could take it on fact and law.

See, you have an additional protection there. The fact is, you get more protection here for an accused in the service, and get it automatically, and you get it without any expense to him, than you get in any other system of administering justice.

Senator SALTONSTALL. Mr. Chairman, I say most respectfully that at this moment, until we hear other witnesses who perhaps will bring up points in addition to what we have had before us up to this time, I am not sufficiently well informed to feel that I could ask Professor Morgan any further questions and what I might call reasonably intelligent questions.

I hope you will suggest to him, perhaps, if we do hear other witnesses who bring up points that we might like to ask him, if he would come back at some future time to discuss those points with us, either in open or executive session.

Senator KEFAUVER. I think that is a very good program, if it is possible to get Professor Morgan to come back.

Do you have any regular time when you might be coming back to Washington, Professor?

Mr. MORGAN. No.

Senator KEFAUVER. I know you were busy when you were professor of evidence at Yale, and I didn't know how they had treated you at Harvard.

Mr. MORGAN. Let me say this, Mr. Chairman: Of course, I am at the demand of this committee. If the committee really wants me, I will return, but I would like to say that on any of these specific points Mr. Larkin will know just as much about the matter and its history as I do, and probably more; and, he has gone through a very extensive hearing, article by article, with reference to the matter.

I, of course, shall come back if you ask me to come back. Any request from you will be considered a command, as far as I am concerned. If I can do it by correspondence, or anything of that sort, I would prefer to do it that way; but, I am at your command, Mr. Chairman.

Senator KEFAUVER. Thank you, Professor Morgan.

I want to ask you one or two questions if I may.

The bill provides for a Judicial Council, and calls it Judicial Council Court of Military Appeals, is that correct?

Mr. MORGAN. Yes.

Senator KEFAUVER. To be composed of not less than three members. What did the study show as to the work load that would be before this Court of Military Appeals?

Mr. MORGAN. We found that it would be probably impossible to get data that would really show what the work load would come down to. Mr. Larkin gathered whatever data he could get from the military services and then he also compared it with the work load of various courts.

Do you have that?

Mr. LARKIN. I can give you an indication, Mr. Chairman, as Professor Morgan said—it was very difficult to judge what the work load would be:

One, by virtue of the different ways that the services keep their statistics; and secondly, by virtue of not knowing just how many people would petition for review.

As Professor Morgan has stated to you, a case will go this Judicial Council on an automatic basis if it is a death sentence of which these are a small number.

A case will be reviewed if it concerns the dismissal of the general officer, if the Judge Advocate requests it or if the court grants what amounts to certiorari to the accused himself.

I looked at the Federal court work load, and I found, for instance, that in a year like 1947, that the district courts had docketed in their courts some 175,000 cases. Well, as you know there are 84 district courts and 199 judges. Only a small percentage of those cases are tried. From that 175,000 cases, there flowed into the United States courts of appeal each year about 2,500 appeals. Of course they were all on a voluntary basis by the defendant, or the party that lost. They are a mixture of civil, criminal, admiralty cases, and so forth. Of that number, 2,500, about 1,500 matters flowed into the Supreme Court of the United States, in a typical year, and that was divided between the motions that came before the Court, writs of all kinds, and cases decided on the merits.

The Supreme Court, for instance, in 1947 decided 217 cases on the merits. Comparing that on the same structural basis, for the fiscal year 1948, the Army and Navy had a total of about 14,000 general

courts martial and of that number from probably 15 to 20 percent were the results of pleas of guilty in which there would probably arise no legal problem for review.

There were, and it varied in the services, and here is where the figures are not accurate on a comparable basis, the 14,000 cases contained some 50 to 80 percent, depending upon the service, of cases of the absentee type, either desertion, absent without leave, absence over leave, or something of that nature which generally are relatively simple cases to prove, both factually and on the law; and, cases in which it is unlikely that there will be serious legal questions, but it is just difficult to tell.

The best guess we had, and of course this Judicial Council would hear cases from special courts martial in which a bad-conduct discharge had been adjudged—the best guess we could make was that the total might amount to about 4,000 cases a year going to the Judicial Council by way of petition, at least.

Now, we assumed that they could easily handle 4,000 cases on petition, in addition to those considered on the merits, if the Supreme Court of the United States can handle 1,500 in view of the fact that the Supreme Court cases are frequently tremendously involved civil questions, civil cases—antitrust cases and all other kinds of cases in which the record occasionally runds into 20 and 30 volumes; whereas, this court will be faced with this specialized type of law, and a type of law in which there is usually not as much or not as many legal problems.

However, that figure is, I will have to say, wholly speculative. We just don't know.

Senator KEFAUVER. May I ask—it is contemplated that the Court of Military Appeals will be started out with three members of the court, and if experience shows that additional members are needed, they can be added to without a change in the law?

Mr. LARKIN. That was our notion, Mr. Chairman, that we provide for not less than three, and we provided that in extraordinary times of emergency, the President could appoint additional panels.

The House committee, I can draw that to your attention right now, in considering that question, felt it was inappropriate to give, by statute, a discretionary power in the President to appoint temporary judges and they struck out that provision of the bill, and they provided that there shall be three judges, and it was their notion that the annual meeting of the Judicial Council with the Judge Advocates General, to survey the operation of the code and the status of pending cases, and the annual report on any phases of the whole system, should be in addition, reported to the Secretary of Defense and the Secretaries of the Departments, and be reported to the Congress, to the Senate and House committees—Armed Services Committees—and those committees at that time, having before them the pending cases and the work load, could then determine whether or not they felt the court was overburdened with work, and at that time could very easily provide for additional judges in the same way that the Congress now is requested, from time to time, to provide for additional Federal judges.

Senator SALTONSTALL. The criticism I heard, Mr. Larkin, I don't know if the chairman agrees or not, but runs the other way, that the court would not be busy enough, rather than too busy.

Is that not what you heard?

Senator KEFAUVER. I have heard it both ways.

Mr. LARKIN. I think, quite speculatively, they will be busy enough. You understand that the accuser had the right to petition. For instance, the Army gave figures to the House committee which stated that as far as they could judge, about 85 percent of their cases, and their cases are running about seven or eight thousand a year—that in 85 percent of them there might be a petition. They did not know whether there would be any merit to it, but of course if it is made, the court has to listen to it.

The Judge Advocate General of the Navy said that in his opinion there would be about 5 percent of the Navy's cases, which had a question of law that was sufficiently serious that this court ought to look at it. Well, that would be 5 percent again of about 7,000 cases, but you understand their work load is going to be a combination, it will be a review of petitions made to them to determine whether or not they will hear the case, whether or not there is good cause shown, which will consume time, and if they feel there is good cause shown, they will have a complete hearing and will act of course then, as an appellate court does, in weighing the merits, writing the opinion, and so on and so forth.

Sorry I can't give you a more concrete answer.

Senator KEFAUVER. Professor Morgan or Mr. Larkin, is it contemplated that the court will sit only in Washington?

Mr. MORGAN. At present, that is the notion, just as the Boards of Review do.

Of course, our original provision was that in time of emergency, they could set up additional courts, which would—or additional judges who would act under the supervision of this particular court, you see, that if you had to have a court abroad, so as to get reasonably prompt final action, that that could be provided for.

Senator KEFAUVER. Now, is there any right of having Presidential approval or disapproval of any action of the Court of Military Appeals, under the President's power of pardon?

Mr. MORGAN. Only where the President is the convening authority: but, the President has clemency powers only; he doesn't have any power to review a question of law.

See, if you gave him power to review questions of law, you will have just the present set-up. He would delegate that to the Secretary of the particular branch of the service, and that Secretary would delegate it to the Under Secretary, and the Under Secretary would set up a board in his office, and that is the way you would work it.

Senator KEFAUVER. As the matter now stands, after the Judge Advocate General passes on a court-martial conviction, it goes to the Secretary of War or Navy, or the Army and Navy, and then to the President?

Mr. MORGAN. Yes.

Senator KEFAUVER. Who must affirmatively sign the conviction?

Mr. LARKIN. That is in the certain types of cases, death cases and the dismissal of officers.

Senator KEFAUVER. That procedure is eliminated under this?

Mr. LARKIN. No; it is not.

Let me put it this way: Under this, the review for the legality of a case stops at the Court of Military Appeals. They are the final arbi-

ters on the law, and neither the Secretary of the Department nor the President becomes a supreme court over them on the law.

However, in a death case, or the dismissal of a general officer, that sentence does not go into effect until it is approved by the President. In the case of the dismissal of an officer other than a general officer, that sentence does not go into effect until approved by the Secretary of the Department, and the Secretary of the Department, of course, has a residual power of clemency to later suspend or set aside the sentence, and the President, of course, has his constitutional powers of commuting. They continue, but those powers that reside in the President, and the Secretaries, are powers of approving sentences or granting further clemencies. They do not have specific appellate powers as to the guilt or innocence.

Mr. MORGAN. They are practically clemency powers, that is practically all they are, and in my opinion, that is all they ought to have.

You don't have the President passing on a sentence——

Senator KEFAUVER. What is the rule of evidence of the review of the weight of evidence by the Court of Military Appeals?

Mr. MORGAN. The only place that the Court of Military Appeals could set aside a conviction or a finding on the ground of insufficient evidence would be where there was not a reasonable—where a reasonable court could not find that, just the same way that the circuit court of appeals, in reviewing a conviction, could pass upon the question of whether the evidence was such that a reasonable jury could find that man guilty.

If not, then there was a direction—there should have been a directed verdict, and then the man gets loose.

Mr. LARKIN. It amounts, I should say, in other words, to a finding of whether a prima facie case has been established or not.

Senator KEFAUVER. That is, if there is any substantial evidence to support the decision of the court-martial court, then the Court of Military Appeals would not upset it on the weight of the evidence.

Mr. LARKIN. That is right.

Mr. MORGAN. It would be the Board of Review that handled it up to that time. The Board of Review could set it aside on the grounds that it was against the weight of evidence. They can cut it down.

Senator KEFAUVER. Has this proposal—I imagine it has been—been considered by the bar associations such as the American Bar Association and others?

Mr. MORGAN. We considered all their suggestions with reference to these things. You will find, in the hearings before the House committee, some suggestions. The American Bar Association, and most of those persons who have appeared, approved the Court of Military Appeals all right, and they approved the supervising function of the Judicial Council and the three Judge Advocates General, and so on. The main objection voiced by some of these was that we hadn't gone far enough in eliminating command control, and that is a question of judgment.

Senator SALTONSTALL. That is where discipline comes in?

Mr. MORGAN. That is right, sir. That is what we said, we had gone far enough. We had preserved, we think, a fair balance between the disciplinary notion and the administration of justice, and that we put enough of a check on command control when we had the review

in the Judge Advocate General's department, which is far away from the convening authority ordinarily, and that can review law, facts, and the sentence, and then we have a review on the law. A man cannot be convicted unless there is evidence on which a jury could have found him guilty and convicted him. He cannot be convicted otherwise. His conviction cannot stand if there is substantial error in the proceedings.

With reference to evidence, or charge to the court or what not, just as in civilian courts——

Senator KEFAUVER. Professor Morgan, what was the ruling on newly discovered evidence? Can a Court of Military Appeals consider it?

Mr. MORGAN. The Court of Military Appeals doesn't touch that. There is a specific provision that was put in on a motion for—where is that?

Mr. LARKIN. I might follow that through, Mr. Chairman.

We have provided that within 1 year, a petition may be made by an accused on the grounds of newly discovered evidence, or fraud on the court, both of which we assume would not have been in the record, for the review; and, if that petition is made while the case is pending before the Court of Military Appeals, then they will hear it and add it to the general review that they are making.

In event, however, that they have sustained the case, they have considered it and sustained the judgment and have concluded their participation in it, then that petition would be heard by the Judge Advocate General; but if during the course of their appeal, or as a matter of fact during the course of the review by the Board of Reviews that petition is made at that time, then those tribunals will take it up.

Mr. MORGAN. That is right.

Mr. LARKIN. That is the arrangement. We felt it incongruous to have the Court of Military Appeals considering or reviewing the case and the man come in with new evidence and not have them, while it is before them, consider it. However, if they have concluded, then we continue the provision of the amended Articles of War last year, and give that jurisdiction to the Judge Advocate General himself.

Mr. MORGAN. It is like the Massachusetts notion under the reformed procedure in Massachusetts, in capital cases: If there is a motion for a new trial made while it is pending on an appeal, the appellate court can hear it, as you know.

Senator KEFAUVER. Does the accused have the right of selection of his own attorney in the proceedings before a Court of Military Appeals?

Mr. MORGAN. Civilian counsel? Certainly, sir; if he wants civilian counsel, and if he doesn't then we have set up in the Judge Advocate General's office, appellate counsel, and defense counsel who must appear for him.

Senator KEFAUVER. Professor Morgan, you have discussed some of the matters of difference which the committee considered, where there were divisions of opinion.

Are there any others that you would like to call to the attention of the subcommittee at this time?

Mr. MORGAN. No; there were three.

One was enlisted men on the court. There was some division on that. That was 3 to 1.

Second was the law officer, whether the law officers should go back with the court and really be a law member. On that, there was a division of opinion, that is, one member of the committee wanted the law officer to be a member of the court and judge on the facts, as a member of the court. Another one of them thought he might go back with them and answer such questions as they gave him, and as they wanted to ask him during the discussions, as I remember. The other two members thought that he ought to be just like a judge, and that was the decision that was made by the Secretary.

That one, and the one about enlisted men on the court, and the Judicial Council, or Court of Military Appeals were the three. On all the rest, we were able to come to substantial agreement.

Senator SALTONSTALL. Do you approve of all the amendments suggested by the committee of the House?

Mr. MORGAN. That is a pretty broad question for me, Senator, because I have not been able to go into them all in detail.

Senator SALTONSTALL. I made it a catch-all question.

Mr. MORGAN. As I look them over, I am in accord with them. One thing that bothered me, Senator, was—one that the chairman asked about, and that is, restricting the Judicial Council to three members.

I should have preferred to allow it to be flexible, so that judges could be added.

Senator SALTONSTALL. I think, Mr. Chairman, as a practical matter, and that is what we have to consider, that the bill would stand a much better chance in passing by limiting it to three men at this time, and not leaving it open.

Mr. MORGAN. It might, very well, but I mean, on the theory, you just don't know how many you will need, and I thought the argument they made, that it could be done by a special action, would be—the main trouble there, Senator, is that it is awfully hard to get legislation through, particularly with busy Congressmen, and it would have to be sort of a crisis in our affairs before you could get through an act that would deal just with that particularly.

I do hope that this annual report which they have required, I thoroughly approve of that, and believe that it will result in keeping Congress alert as to the administration of military justice and the necessity of making changes from time to time, just as the Supreme Court Advisory Committee keeps its hand on the rules of court.

Senator KEFAUVER. Professor Morgan, we are very grateful to you for coming down and giving us the benefit of your thoughts and testimony.

Mr. MORGAN. Mr. Chairman, the gratitude is all the other way, because I am very glad to do anything I can to support this bill.

Senator KEFAUVER. I may say that the chairman has a very pleasant recollection of the days when Professor Morgan taught evidence at Yale University. I am glad to see that Harvard hasn't——

Mr. MORGAN. It hasn't corrupted me too much.

Senator KEFAUVER. Mr. Larkin, do you have any additional statement to make at this time?

Mr. LARKIN. No; I do not, Mr. Chairman. I am available, as Professor Morgan says, on behalf of Secretary Johnson, to do anything the committee would like me to do. If you care to have an article by article reading of the bill, I went through just that procedure with the House committee.

If there are any specific questions any committee members have as to the background, or as to the previous Articles for the Government of the Navy, or previous Articles of War, and how the provisions in the code resolve the differences, or any questions of that character—I am available at all times for the committee, and if you care to go into further hearings of that character, I am prepared to give as much assistance as I possibly can.

Senator KEFAUVER. We appreciate your willingness to assist, and I think the procedure we will follow is that, we want to give everyone who has a viewpoint about this proposal, an opportunity to be heard.

I know there is a great deal of interest in it, and a good many civilians and representatives of service organizations are interested and undoubtedly want to express their views, and we would like to get that testimony.

Then, at a later date perhaps we could call you back for a discussion of the provisions of the bill in the light of the testimony we have received.

Mr. LARKIN. If that is the pending arrangement, Mr. Chairman, I would be happy to follow through.

Senator KEFAUVER. I see a number of friends and people here that I know are interested in this proposal.

Who would like to testify?

Colonel KING. Do you mean now?

Senator KEFAUVER. No, at some later time.

Colonel KING. I have given my name to Mr. Galusha.

Senator KEFAUVER. We have Mr. Speigelberger, chairman of the special committee of the American Bar Association.

Who is here besides Colonel King and Colonel Oliver, who wish to testify?

Colonel KING. I know that Colonel Hughes, president of the Judge Advocates Association, wants to testify. They made a survey of their members, and I know he would like the committee that survey.

Senator KEFAUVER. Colonel King, when would it be convenient for you and Colonel Oliver to testify?

Colonel KING. At your convenience, sir.

Senator KEFAUVER. Of course we welcome all witnesses, and I may say further, that in addition to witnesses, we have before us the more than 1,200 pages of House testimony which the committee will consider.

The committee will hear further testimony on Wednesday, a week from today, beginning at 10 o'clock and, Colonel King, if you and Colonel Oliver will be prepared to testify at that time, we will hear you in that order.

Colonel OLIVER. Do you want us to discuss both versions, or just the Senate bill?

Senator KEFAUVER. We would like for you to be in position to discuss the Senate committee bill, and the House committee, H. R. 4080, with the amendments that have been added.

If there is nothing further to come before the committee, we will be recessed until Wednesday at 10 o'clock.

(Whereupon, at 12:05 p. m., the subcommittee stood in recess until Wednesday, May 4, 1949 at 10 a. m.)

# UNIFORM CODE OF MILITARY JUSTICE

**WEDNESDAY, MAY 4, 1949**

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES,
*Washington, D. C.*

The subcommittee met, pursuant to adjournment, at 10:10 a. m., in room G–23, United States Capitol, Senator Estes Kefauver (chairman of the subcommittee composed of Senators Kefauver, Tydings, Russell, Saltonstall, and Morse) presiding.

Present: Senators Kefauver and Morse.

Also present: Mark H. Galusha, of the committee staff; and John Simms, legislative counsel of the Senate.

Senator KEFAUVER. The committee will come to order.

This is a continuation of hearings by a subcommittee of the Armed Services Committee with regard to S. 857, a bill to establish a uniform code of military justice.

At our last meeting the subcommittee heard Professor Morgan and Mr. Larkin of the committee which drafted the bill.

I am informed that the House Armed Services Committee has reported favorably H. R. 4080, with a few minor amendments, and that a rule has been granted for its consideration. Copies of the House report are before each committee member.

Today we have several witnesses who have requested to be heard on the bill. In addition to commenting on S. 857, we will also welcome comments on the changes on the bill of the House committee.

The subcommittee appreciates your interest and the time which you have given to the consideration of the subject bill, and we are glad to have your recommendations.

We have two witnesses from New York, and in order not to inconvenience them any more than necessary, we will hear them first.

Now, we want to give everybody as much time as they wish to have in order to be heard. On the other hand, we have 15 or 20 applications from interested people who wish to be heard, so we want to conserve as much time as possible. Anyone who has a prepared statement may, if he wishes, file this prepared statement which the members of the committee and the staff will study and consider, and they can then, if they wish, summarize the particular points which they wish to make in connection with the proposed legislation; or if any witness wishes to read his prepared statement, he can do that.

Now, Mr. Spiegelberg, chairman, special committee of the American Bar Association on Military Justice, we are grateful to you for coming down and giving us the benefit of your study which I know has been considerable.

## STATEMENT OF GEORGE A. SPIEGELBERG, CHAIRMAN, SPECIAL COMMITTEE ON MILITARY JUSTICE OF THE AMERICAN BAR ASSOCIATION

Senator KEFAUVER. Mr. Spiegelberg, do you have a prepared statement?

Mr. SPIEGELBERG. I have, Senator.

Senator KEFAUVER. I see.

Mr. SPIEGELBERG. And I would ask your leave to submit this statement which I have no desire to read.

I would like to call the committee's attention to the fact that there are three annexes to the statement. The first deals with the position that the American Bar Association has taken with respect to military justice since 1946. The most recent action of the American Bar Association was taken as recently as February of this year, and that action is the first exhibit annexed to my brief statement.

The second one is an article written by Messrs. Farmer and Wels, which appears in the April, 1949, New York University Law Quarterly Review, which contains as able a criticism of the pending legislation—and by "criticism," I mean to say constructive criticism of the pending legislation—as any that I have seen, and I have taken the liberty, with their permission, to make that an exhibit to my statement.

The third document that is attached—I hope that the committee will find that most helpful, and it will utilize it. I have taken the liberty of drafting the changes which will be necessary to make the proposed code into a real instrument for military justice in the armed services. I will refer, with your permission, a little later to the one outstanding vice which still remains in the proposed bill.

Senator KEFAUVER. Mr. Spiegelberg, your statement, together with the appendices will be printed at this point in the record, and your remarks of explanation or enlargement upon any parts you wish to make will follow the statement. It will go into this part of the record

(The prepared statement presented by Mr. Spiegelberg together with attachments read as follows:)

STATEMENT OF GEORGE A. SPIEGELBERG, CHAIRMAN OF THE SPECIAL COMMITTEE ON MILITARY JUSTICE OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and members of the committee, my name is George A. Spiegelberg. I appear before this committee as the duly accredited representative of the American Bar Association, being the chairman of that association's special committee on military justice.

I may say by way of introduction that I am a veteran of both World Wars I and II and that in the latter war I served overseas for 30 months as a staff officer, the last 15 months of such service having been on General Eisenhower's staff; that I was retired from the service for line of duty physical disability and for a year and one-half prior to my retirement I held the rank of colonel, General Staff Corps. I have been a member of the bar of the State of New York since 1922 and a professor of law at New York University since 1924. I am now engaged in the practice of law in New York City.

With the permission of the committee I should like to place in the record a copy of the report submitted to the house of delegates of the American Bar Association by my committee, which report was unanimously adopted on February 1, 1949, by the association at the meeting of its house of delegates held in Chicago, Ill. I should like to direct the attention of this committee to the fact which is made entirely apparent by the annexed report that for the last 3 years the American Bar Association has consistently and repeatedly urged the Congress of the United States to remove courts martial from the domination of command.

As the major reform still to be accomplished is so ably presented by Messrs. Arthur E. Farmer and Richard H. Wels in an article entitled "Command Control—or Military Justice?" appearing in volume 24, No. 2 of the New York University Law Quarterly Review in April of 1949, I have with the authors' consent appended that article as my written statement before this committee and I would request the committee's permission to incorporate it in the record.

I am also taking the liberty of submitting to this committee for its consideration the amendments to the Uniform Code of Military Justice which was introduced in the House of Representatives as H. R. 2498, which amendments were prepared by me on the invitation of the chairman of the subcommittee of the Armed Forces Committee of the House. These proposed amendments would effectively check command domination of the courts without in any way interfering with the proper functions of command.

I desire on behalf of the American Bar Association and on my own behalf to express my appreciation for your courtesy.

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REPORT OF THE SPECIAL COMMITTEE ON MILITARY JUSTICE

*To the House of Delegates of the American Bar Association:*

The undersigned, the special committee on military justice, of the association, appointed by action of the house of delegates, on September 6, 1948, hereby submits its report and a brief statement of the reasons why action is requested at this time.

The War Department Advisory Committee on Military Justice, appointed by the Secretary of War, on March 25, 1946, upon the nomination of this association, made its report on December 13, 1946, advocating certain drastic changes in the existing Articles of War. Certain of the recommendations were adopted in legislation, which subsequently became law, the bill referred to being commonly known as the Elston bill (H. R. 2575, 80th Cong.).

By far the most important recommendations of the War Department's Advisory Committee on Military Justice were, however, totally ignored, and this association, on two subsequent occasions, referred to these omissions and directed the attention of Congress to the neecssity of curing the defects in the Elston bill.

On September 26, 1947, the assembly and the house of delegates of this association passed the following resolution:

"*Resolved*, That the American Bar Association urgently recommends the passage by the Congress, and the approval by the President, of legislation separating military justice from command, and vesting final reviewing authority by the military, and final authority to mitigate, to remit, and to suspend sentences in the Judge Advocate General's Department, without in any way limiting other existing powers to mitigate, remit, or suspend sentences."

On or about February 21, 1948, the house of delegates reiterated the prior resolution and, in addition, adopted the following resolution:

"*Resolved*, That said bill (the Elston bill) should be further amended so that both the trial judge advocate and defense counsel must be lawyers and, where available, members of the Judge Advocate General's Department."

Numerous other groups of veterans and of lawyers supported the stand taken by this association. Nonetheless, the Elston bill became law through its adoption by the Senate of the United States, on June 9, 1948.

In June of 1948, as a result of the bill unifying the armed services, the Secretary of Defense appointed a committee to draft a Uniform Code of Military Justice. That bill has not as yet been published, but it will be published and submitted to the Congress before the 15th of February 1949. We, therefore, submit that it is of the greatest importance that the house of delegates of this association should again, in clear and unmistakable terms, state its position and authorize its appropriate officers and members to use every proper effort to see that a bill effecting real reforms in our court-martial system becomes law. To that end, your committee respectfully submits the following preambles and resolutions, and earnestly recommends their adoption at the current meeting of the house of delegates:

"Whereas the Advisory Committee on Military Justice of the War Department, appointed by the Secretary of War, on the nomination of this association, devoted the major part of its report to the recommendation that the conduct of courts

martial should be withdrawn from the domination of command; and that the conduct of courts martial should be in the hands of trained lawyers; and

"Whereas this association, on September 26, 1947, and on or about February 21, 1948, supported the recommendations of the War Department's Advisory Committee on Military Justice; and

"Whereas the War Department substantially ignored those recommendations and succeeded in procuring the adoption of H. R. 2575, commonly known as the Elston bill, which signally fails to provide for the reforms advocated by the War Department's Advisory Committee on Military Justice; and

"Whereas there will, in the immediate future, be introduced into the Congress a new bill for the establishment of a Uniform Code of Military Justice; and

"Whereas it is vital to insure a fair and impartial trial of those citizens subject to military justice; and

"Whereas the present system of military justice fails so to do in that it is indefensible and contrary to all concepts of justice that the authority to appoint the prosecutor, the defense counsel and the court, and the right to pass upon the judgment of that court be vested in the same person; and

"Whereas there can be no justification for the influencing of courts martial by the commanding officer, but there can be no other justification for the rejection of the Advisory Committee's recommendation with respect to the checking of command control, except the continuation of the right to influence courts martial by the commanding officer: Now, therefore, be it

"*Resolved*, that this association urge the Congress of the United States to vest in an independent Judge Advocate General's Department the following powers, now vested in the commanding officer:

"(*a*) The exclusive right to appoint general or special courts martial.

"(*b*) The exclusive right to appoint assigned defense counsel.

"(*c*) The right to review the action of general and special courts martial. A right to mitigate the court's sentence shall remain in the commanding officer; and be it further

"*Resolved*, That in all general courts martial the defense shall be adequately represented in all stages of the proceeding, including trial and review, and appropriate legislation should be enacted to make such representation effective, which legislation should include provision for independent civilian review; and be it further

"*Resolved*, That in all general courts martial both the prosecutor and assigned defense counsel should be lawyers; and be it further

"*Resolved*, That, so far as feasible, special courts martial shall be surrounded by all of the safeguards surrounding general courts martial; provided, further, however, that no special court may grant a bad-conduct discharge unless all requirements applicable to a general court have been observed; and be it further

"*Resolved*, That this association recommends legislation establishing an advisory council in the office of the Secretary of Defense, consisting of nine civilians having predominantly civilian background and experience, and three service members representing the legal offices of the three services, the civilian members to be appointed by the President of the United States and to serve, without salary, though entitled to a per diem and traveling expenses, which said council shall be required to report annually to Congress, and to that end it shall be supplied, by the Secretary of Defense, with the necessary research and clerical staff; and be it further

"*Resolved*, That for and in the name of this association, its appropriate officers, governors, delegates, and members, its special committee on military justice do all acts and things necessary and proper, including the right to appear before committee of the Congress and any other tribunal, to urge the enactment into law of the amendments above suggested, and such other amendments consistent with the foregoing as will make the courts-martial system of the armed services of the United States a true system of justice, before whose tribunals the citizens of the United States will, so far as may be possible, be assured of a fair and impartial trial."

Respectfully submitted.

GEORGE A. SPIEGELBERG, *Chairman*.
STEPHEN F. CHADWICK,
RICHARD K. GANDY,
DOUGLAS HUDSON,
ARTHUR JOHN KEEFFE,
WILLIAM H. KING, Jr.,
JOHN McI. SMITH.

[From the New York University Law Quarterly Review, April 1948]

## COMMAND CONTROL—OR MILITARY JUSTICE?

(By Arthur E. Farmer and Richard H. Wels)

We Americans have always prided ourselves on our system of justice. The constitutional guaranties of indictment by grand jury for infamous crime, against double jeopardy and self-incrimination, against the deprivation of life, liberty or property without due process of law are assured by the first amendment to the Federal Constitution. The right in criminal prosecutions to a speedy and public trial by an impartial jury, the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against us, to have compulsory process to obtain witnesses in our favor and to have the assistance of counsel for our defense are made cornerstones of our liberties by the sixth amendment.

Yet many of these rights are lost when a citizen enters his country's armed services because of the provisions of section 8 of the Constitution, which gives to Congress the power to make rules for the government and regulation of the land and naval forces. Pursuant to this authority, Congress had prescribed Articles of War for the government of the Army and articles for the government of the Navy which, in their original form, were mere extensions of the monarchial power to enforce discipline.[1]

Little criticism was leveled at these codes of military justice until the first great citizens' army was grafted into the service of the United States. Following the close of World War I cases of tryannical oppression, arrant miscarriages of justice and a complete absence of any means whereby the wronged individual could obtain recourse came to light. Not only was public opinion aroused, but a bitter schism developed in the ranks of the military, each side having its advocates on the floor of the Senate.[2] Championing a radical revision of the Articles of War were Senator Chamberlain and Maj. Gen. S. T. Ansell; defending the Army's administration of justice were Maj. Gen. E. H. Crowder and Secretary of War Newton D. Baker. The letters written by Ansell and Crowder as they appear in the Congressional Record are striking evidence in support of Ansell's contention that whatever may have been the effectiveness of the court-martial system, it was certainly not a system of justice as Americans understand it.[3]

The Chamberlain bill[4] which sought to provide adequate legal representation for the accused, to insure the impartiality of the court martial by removing it from command control, which provided for the service of enlisted men on courts martial and which further set up an adequate system of review, was killed in committee.

Nevertheless the pressure of public opinion was such that substantial changes were effected in the system. On June 4, 1920, a new statute for the government of the armies of the United States was enacted.[5] This statute represented a great stride forward for the Army court-martial system. It did not however affect the articles for the government of the Navy. Among other things the new Articles of War permitted enlisted men to prefer charges and provided for an impartial investigation of the charges before bringing them to trial.[6] They set a definite minimum for the number of officers to serve on a court marital.[7] They provided for the appointment of a law member, who was required to be either an officer of the Judge Advocate General's Department or an officer of some other branch of the service specially qualified to perform the duties of law member.[8]

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Arthur E. Farmer, a member of the New York bar, is chairman of the committee on military law of the War Veterans' Bar Association and a member of the special committee on military justice of the Association of the Bar of the City of New York. He served in World War II in the Judge Advocate General's Department.

Richard H. Wels, also a member of the New York bar, is chairman of the special committee on military justice of the New York County Lawyers' Association and a member of the special committee on military justice of the Association of the Bar of the City of New York. Mr. Wels was on active duty in the United States Navy and was formerly special counsel to the House Naval Affairs Committee.

[1] Ansell, Military Justice, 5 Corn. L. Q. 1–2 (1919).
[2] 58 Congressional Record 5384–5385 (1919).
[3] 58 Congressional Record 3938–3948, 6494–6503 (1919).
[4] S. 64, H. R. 367, 66th Cong., 1st sess. (1919).
[5] 41 Stat. 759–812 (1920), 10 U. S. C. §§ 1471–1593 (1946).
[6] A. W. 70 [References to "A. W." refer to the numbered Articles of War set forth in 10 U. S. C., ch. 36 (1946)].
[7] A. W. 5 and 6.
[8] A. W. 8.

They provided for the appointment of counsel for the accused as well as a prosecuting officer known as the trial judge advocate[9] and set up a system of review which, if not as comprehensive as it might have been, at least was a marked advance inasmuch as there had been no system of review up to that time.[10]

These articles remain in force, unchanged, from 1920 until amended by the Elston Act which was passed in 1948 and became effective February 1, 1949.[11] While they functioned satisfactorily—or at least no complaint was heard as to their adequacy—in time of peace, the outcry which arose at the end of World War II was such as to compel the attention of the War Department. The abuses of the system were given official recognition by Secretary of War Patterson when, on June 9, 1945, he appointed a clemency board to review all cases tried by general court martial in which the accused was still in confinement.[12] The board reported in 1946 that it had received more than 27,500 cases and had reduced or remitted the sentence in 85 percent of them.[13]

Even before the close of hostilities, the services, driven by the force of public opinion, appointed committees to study the workings of the court-martial system and to recommend changes in the administration of military justice. Subsequent to VJ-day, Secretary of War Patterson, on March 25, 1946, appointed the War Department Advisory Committee on Military Justice (better known as the Vanderbilt committee), the membership of which had been nominated by the American Bar Association. The Navy appointed the General Court Martial Sentence Review Board, familiarly known as the Keeffe Board, and by amendment to the precept convening this board, dated June 24, 1946, the board was directed to submit a report of the cases considered and the sentences reviewed by it and to include in its report such recommendations as it deemed appropriate with respect to court-martial procedure and policies. Previous studies of naval justice had been made by Secretary Forrestal's direction by Arthur A. Ballantine, Judge Matthew F. McGuire, and Father Robert J. White.

The Vanderbilt committee held full committee hearings in Washington and regional public hearing in New York, Philadelphia, Baltimore, Raleigh, Atlanta, Chicago, St. Louis, Denver, San Francisco, and Seattle. The testimony adduced from the witnesses filled 2,519 pages of transcript. The witnesses were not drawn from the ranks of the malcontent, but included the Secretary of War, the Under Secretary of War, the Chief of Staff of the Army, the Commander of the Army Ground Forces, the Judge Advocate General, the Assistant Judge Advocate General, general officers as well as those of lower grade and volunteer witnesses who had served as officers and enlisted men during World War II.[14]

The Vanderbilt committee found that "although the innocent were not punished, there was such disparity and severity in the impact of the system on the guilty as to bring many military courts into disrepute both among the law-breaking element and the law-abiding element, and a serious impairment of the morale of the troops ensued where such a situation existed."[15] The committee made as its primary recommendation the checking of command control.[16]

In order to understand the committee's recommendations it is necessary to outline briefly certain aspects of the functioning of the court-martial system. In the typical case before a general court martial, the charges against the accused having been prepared and investigated and a recommendation for trial having been made by the staff judge advocate (the commanding general's legal adviser), the case is referred by the commanding general to the trial judge advocate, the prosecuting officer of the court which has been appointed by the commanding general from officers of his command.[17] Not only has the commanding general appointed the court, but he has also appointed the trial judge advocate and the defense counsel.[18] The result is that the accused, having been or-

[9] A. W. 11 and 17.
[10] A. W. 50½.
[11] Pub. L. No. 759, 80th Cong., 2d sess., ch. 625 (June 24, 1948).
[12] War Department Advisory Board on Clemency, more familiarly known as the Roberts Board.
[13] Rept. War Department Advisory Board on Clemency (1946).
[14] Rept. War Department Advisory Committee on Military Justice 2 (1946).
[15] Id. at 3–4.
[16] Id. at 6.
[17] A. W. 8.
[18] A. W. 11. The accused is given the right by A. W. 17 to be represented before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available. Civil counsel is usually beyond the means of the accused, and whether military counsel is "available" depends upon the decision of the commanding officers of the counsel requested. See *Henry* v. *Hodges* (171 F. 2d 401, 403 (C. C. A. 2d, 1948)). As a consequence, the accused is almost invariably represented only by the regularly appointed defense counsel, i, e., the officer appointed by the commanding general.

dered to trial by the commanding general, is represented by defense counsel appointed by the commanding general, and is tried before a court which consists entirely of officers who are dependent upon the commanding general for their assignments of duty, efficiency ratings, promotions and leaves. If the accused is convicted, the commanding general reviews the record of the trial and in most instances has the power to order the sentence executed. It is obvious that the commanding general has it within his power to influence defense counsel and to control the court by indicating to it, directly or indirectly, his wishes as to the findings and sentence.

It is this complete domination of the court and counsel by the commanding general which is referred to as "command control." The possibilities of so exercising this control as to deprive the court-martial of any real independence is apparent and at times command has so outrageously dominated the courts martial [19] as to cause the Federal courts to use such extreme terms as "military despotism" [20] and "a court * * * saturated with tyranny." [21]

In demanding the checking of command control, the War Department Advisory Committee said: [22]

"The Committee is convinced that in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence their decisions. It is not suggested that all commanders adopted this practice but its prevalence was not denied and indeed in some instances was freely ad-

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[19] A. W. 46; A. W. 50½.

[20] *Shapiro* v. *United States* (69 F. Supp. 205, 207 (Ct. Claims, 1947)).

[21] Murrah, C. J., in *Beets* v. *Hunter* (75 F. Supp. 825, 826 (D. C. Kans. 1948). It is difficult for one who has not had first-hand experience with the operation of the Army and Navy court-martial systems to envisage the ease with which commadning officers can dictate the findings and sentence of the court. In *Beets* v. *Hunter*, supra, the convicted accused successfully applied for a writ of habeas corpus. The pertinent facts are stated in the following quotation from Judge Murrah's opinion (75 F. Supp. at 826):

"When Captain Morgan called upon him (Beets, the accused petitioner), as the appointed defense counsel, Captain Morgan was informed that he (Beets) wished to have Lieutenant Fox represent him, whereupon Captain Morgan left him and went back, leaving the impression at least that he would have Lieutenant Fox call him. Lieutenant Fox did not see this petitioner; instead Captain Morgan returned and on the day before the trial was furnished a copy of the charges. He confesses on the witness stand that he was wholly incompetent to represent him, and he also makes it plain, manifestly plain, too plain for mistake, that he did so only on orders—acting under orders as a soldier.

"The trial of this case in the eyes of both the prosecution and the defense was wholly obnoxious and repulsive to their fundamental sense of justice, and that is the test by which this court should judge it.

"The court has no difficulty in finding that the court which tried this man was saturated with tyranny: The compliance with the Articles of War and with military justice was an empty and farcical compliance only, and the court so finds from the facts and so holds as a matter of law.

"He could not have received due process of law in a trial in a court before men whose judgments did not belong to them, who had not the will nor the power to pass freely upon the guilt or innocence of this petitioner's offense, the offense for which he was charged. It cannot stand the test of fundamental justice. It may have been prompted by the exigencies of war, but it can't stand in the light of cold reason and justice as we love it and for which this petitioner was fighting when he was arrested."

In *Shapiro* v. *United States* (69 F. Supp. 205 (Ct. Claims, 1947)), the plaintiff was appointed to defend before a court martial an American soldier of Mexican descent who was charged with assault with intent to commit rape. In order to demonstrate the mistake in identification by the prosecuting witnesses, the plaintiff substituted for the accused at the court-martial trial another American soldier of Mexican descent. This substitute was identified by the prosecuting witnesses as the attacker and was convicted. The plaintiff thereupon informed the court of the deception that he had practiced, whereupon the real defendant was brought to trial, was also identified as the attacker, and was convicted and sentenced. Several days later Lieutenant Shapiro, the plaintiff, was arrested. A day or two after at 12:40 p. m., he was served with charges of effecting a delay in the orderly progress of the general court martial. He was then notified that he would be tried at 2 p. m. on the same day, and was actually brought to trial at that time, at a place 35 to 40 miles from the place where he had been served with the charges. Shortly after his arrest, plaintiff requested the services of Capt. James J. Mayfield to represent him, but this officer was named, in the order preferring charges, as the trial judge advocate. There being but 1 hour and 20 minutes in which to select counsel and prepare for trial, Lieutenant Shapiro thereupon selected as his defense counsel two lieutenants, neither of whom was a lawyer. When the court martial convened, the plaintiff moved for a continuance of 7 days on the ground that his counsel had not had sufficient time to prepare his defense. The motion was denied. He was convicted at 5:30 that afternoon and was sentenced to be dismissed from the service.

Judge Whitaker characterized the proceedings as follows (69 F. Supp. at 207): "A more flagrant case of military despotism would be hard to imagine. It was the verdict of a supposedly impartial judicial tribunal; but it was evidently rendered in spite against a junior officer who had dared to demonstrate the fallibility of the judgment of his superior officers on the court—who had, indeed, made them look ridiculous. It was a case of almost complete denial of plaintiff's constitutional rights. It brings great discredit upon the administration of military justice."

[22] Rept. War Department Advisory Committee on Military Justice, 6–7 (1946).

mitted. The close association between the commanding general, the staff judge advocate, and the officers of his division made it easy for the members of the court to acquaint themselves with the views of the commanding officer. Ordinarily in the late war a general court was appointed by the major general of a division from the officers in his command, and in due course their judgment was reviewed by him. Not infrequently the members of the court were given to understand that in case of a conviction they should impose the maximum sentence provided in the statute so that the general, who had no power to increase a sentence, might fix it to suit his own ideas."

Although the Keeffe Board which was composed of commissioned officers of the naval services, with the exception of its president and vice president, refused to go so far as to say that a naval court appointed in like manner was "a mere creature of the convening authority, appointed to do his bidding," [23] it nevertheless suggested that—

" * * * convening authorities would not detail named officers to specific courts for particular trials, but would detail qualified personnel within their command to court-martial panels from which members of the court would be taken from time to time to fill vacancies and to replace relieved members on some impersonal method." [24]

All this had a familiar ring. On September 15, 1919, even before the adoption of the 1920 Articles of War, the following colloquy took place on the floor of the Senate between Senator Norris and Senator Chamberlain: [25]

"Mr. NORRIS. One of the evils, as I understand it, is that all the men, not only the members of the court but the prosecuting officer as well as the attorney for the defense, are selected by the man who makes the charge in reality, and from whom every one of the officials, if they get a promotion, must secure it. Is that right?

"Mr. CHAMBERLAIN. Absolutely.

"Mr. NORRIS. Of course, that surrounds the young man with an air of injustice to begin with.

"Mr. CHAMBERLAIN. There is no question about that. The commanding officer appoints the court, he appoints the prosecutor, he appoints the counsel for the defendant, * * * he approves or disapproves the sentence when it is rendered."

And Prof. Edmund M. Morgan of the Harvard Law School, Chairman of the Forrestal Committee on a Uniform Code of Miltary Justice, made the comment in 29 Yale Law Journal 52, 60 (1919):

"The control of appointing and other superior military authority over the court and its findings is to the civilian the most astonishing and confusing characteristic of the court-martial system.

A poll made in 1947 of the members of the Judge Advocates Association, an organization comprising in its membership nearly 2,200 of the some 2,700 lawyers who served as officers in the Judge Advocate General's Department during World War II, showed a complete concurrence in the conclusion that the primary requirement of a court-martial system which could be said to administer justice was the total separation of appointing and reviewing authority from command. Of the 774 members who answered the questionnaire, 703 recommended a total separation of the courts from the command control.[26] In order to appreciate the significance of this vote, it must be realized that the members of the Judge Advocate General's Department were the military personnel most closely associated with the administration of the court-martial system.

Despite this uniformity of opinion among those best qualified to pass judgment, the court-martial reform legislation, as introduced and as passed, did not contain provisions which would divorce the court-martial system from command control. It is not without significance that the bill as introduced had been framed by the War Department, which had ignored the primary recommendations of its own Advisory Committee on Military Justice by retaining the old method of appointing courts and counsel and placing the initial power of review in the commanding officer who was vested with appointing authority. This legislation, known as the Elston Act, had a stormy history and resolved itself into a tug of war between the Secretary and Under Secretary of War and

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[23] Rept. Gen. Court-Martial Sentence Rev. Bd. 62 (1945).
[24] Id. at 68–69.
[25] 58 Congressional Record 5384–5385 (1919).
[26] Hearings of House Subcommittee on Armed Services on H. R. 2575, No. 125, 80th Cong., 2d sess., 2002 (1947).

certain high-ranking officials in Washington on one side and, on the other, various bar associations and veterans' organizations which had made a study of the actual operation of the court-martial system, and the members of which had had far better opportunity than the higher echelons of the Army and the War Department to view the court-martial system in the field at division level and lower.

The House Committee on Armed Services submitted a report [27] and its Subcommittee on Military Justice held full hearings. The provisions of the Elston bill setting up the Judge Advocate General's Department as a separate corps with its own promotion list and responsibility for performance of duty through its own chain of command was the focal point of attack by the opponents of basic reform. As the bill contained no provisions for the separation of the courts from command there was no necessity for attack on that fundamental reform.

Despite the opposition to the creation of a separate Judge Advocate General's Corps, this provision was retained when the bill was reported out of committee and the Elston bill was passed by the House virtually without opposition. It was then brought to the floor of the Senate as an amendment to the Selective Service Act of 1948 and, upon the assurances of Senator James Kem that it incorporated all the recommendations of the Vanderbilt Committee and had been approved by the American Bar Association,[28] it was passed by the Senate.

These statements were entirely incorrect and in view of the questions concerning the bill which arose during the short Senate debate, it is questionable whether the Elston bill would have passed in its present form had not the Senate been misinformed as to the scope of the bill and as to its approval by the American Bar Association. The Elston bill was approved by the President on June 24, 1948 and became effective February 1, 1949.

Notwithstanding its defects, the Elston Act represents a step forward. By amendment to section 8 of the National Defense Act, an independent Judge Advocate General's Corps with a separate promotion list is set up.[29] It provides that all members of the Judge Advocate General's Corps shall perform their duties under the direction of the Judge Advocate General.[30] It provides that all members of the corps will be assigned as prescribed by the Judge Advocate General, after appropriate consultations with commanders on whose staffs they may serve, and it authorizes the staff judge advocate of any command to communicate directly with the staff judge advocate of superior or subordinate command, or with the Judge Advocate General.[31]

Although it continues the vices of the existing system with respect to the appointment of the courts, the trial judge advocate and the defense counsel by the commanding general and the review of the findings and sentence of the courts by him, it forbids the censure or reprimand of any member of a court martial with respect to the findings or sentence adjudged by the court and provides that no person subject to military law shall attempt to coerce or unlawfully influence the action of a court martial in the performance of its duties.[32]

The Elston Act further provides that the officer appointing a general court martial shall detail as one of the members a law member who shall be an officer of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail.[33]

Its provisions tend to promote the appointment of better qualified personnel both as trial judge advocates and as defense counsel.[34] For the first time, it is required that, upon the request of an accused enlisted man, there shall be appointed as members of the court martial enlisted men to the number of at least one-third of the total members of the court.[35]

The Elston Act further attempts to improve the system of review of the findings and sentences of courts martial and provides for the creation of a Judicial Council to consist of three general officers of the Judge Advocate General's Department to act as a kind of Army Supreme Court.[36] Unfortunately, the new provisions respecting review pile chaos upon confusion with the result that they are even less understandable and more complicated than those which had previously

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[27] H. Rept. No. 1034, 80th Cong., 1st sess. (1948).
[28] 94 Congressional Record 7754 (June 9, 1948).
[29] Pub. Law No. 759, 80th Cong., 2d sess., sec. 246 (June 24, 1948).
[30] Id., sec. 248.
[31] Id., sec. 223.
[32] Id., sec. 233.
[33] Id., sec. 206.
[34] Id., sec. 208.
[35] Id., sec. 203.
[36] Id., sec. 226.

existed under article 50½ of the 1920 Articles of War. Finally, the Elston Act provides a procedure for petitioning the Judge Advocate General for a new trial, the grounds for which have been limited by regulation to jurisdictional error, substantial injustice at the trial or newly discovered evidence sufficient to affect the result of the trial.[37]

Despite the fact that the Elston Act was hailed in some quarters as an effective reformation of the Army court-martial system, it was immediately attacked by the bar associations as reform in name only and it was pointed out in no uncertain terms that so long as the power remained in command to appoint the courts, the trial judge advocate and the defense counsel, to refer cases for trial and to review the findings and sentences of the courts, the reforms were illusory.[38] It should further be noted that the Elston bill affects the Army alone and that neither the Navy, the Marine Corps nor the Air Force are afforded even the inadequate reforms which it embodies.

Partly to extend the provisions of the Elston Act to the Air Force, the Navy and the Coast Guard, and to set up uniform court-martial procedures for all the armed services, and partly to meet certain criticisms already directed at the act, in August 1948 Secretary of Defense Forrestal appointed a special committee, headed by Prof. Edmund M. Morgan of the Harvard Law School,[39] to prepare a code, uniform in substance, interpretation and application, that would protect the rights of those subject to it and increase public confidence in military justice without impairing performance of military functions.

The Uniform Code of Military Justice prepared by the Forrestal committee was introduced in the House and Senate on February 8, 1949, as S. 857 and H. R. 2498. This code embodies further improvements in the system of military justice, but incredible as it may seem, maintains intact the old system criticized by Senators Norris and Chamberlain as far back as 1919,[40] whereby the commanding general appoints from his command the members of the court, the trial judge advocate and defense counsel, refers cases to the court and thereafter reviews the court's findings and sentences.[41]

Before analyzing the basic premises which account for the survival of a system which lends itself so readily to tyranny and oppression, it would be well to consider the accomplishments of the Forrestal committee.

The act framed by the committee, for the first time states in clear and readily understandable language the procedure to be followed, commencing with the apprehension of the accused and the placing of charges against him and ending with the final review of the record of trial. The substantive law is made more explicit and restated in laymen's language. A new terminology is employed which will be uniform throughout the services.

The summary court martial, the lowest court, which consists of a single officer and before which neither the prosecution nor the accused may be represented by counsel, has been deprived of all power to try an accused except with his consent unless he has first been given the opportunity to accept limited nonjudicial punishment.[42] As the summary court has few if any characteristics of a court, the change is salutary. In order to obviate the necessity for trials by courts martial where minor offenses are involved, the punishments which a commanding officer may impose without trial have been considerably extended.[43] It should be made explicit by amendment to the code that the Army's previous practice of permitting the accused to demand trial by court martial in lieu of nonjudicial punishment is to be preserved. This option should be extended to naval personnel, upon whom nonjudicial punishment may now be imposed without trial and without the accused's consent.[44] The code should likewise be amended

[37] Id., sec. 230; Manual for Court Martial, pars. 101, 102 (1949).
[38] 34 A. B. A. J. 702–703 (1948); 6 N. Y. County Lawyers Association Bar Bul., 5–12 (1949); 4 Rec. Association of the Bar of the City of New York, 28–31 (1949).
[39] Cf. 29 Yale L. J., 52, 60 (1919).
[40] 58 CONGRESSIONAL RECORD, 5384–85 (1919).
[41] At the time the proposed uniform code was introduced in the Senate and House, Secretary of Defense Forrestal issued a press release which emphasized the enormous powers retained by command. The release read in part:
"Among command functions the proposed code would retain are:
"1. Commanding officers refer the charges in general, special, and summary courts martial and convene the courts;
"2. Commanding officers appoint the members of the courts;
"3. Commanding officers appoint the law officer and counsel for the trial;
"4. Commanding officers retain full power to set aside findings of guilty and to modify or change the sentence, but are not permitted to interfere with verdicts of not guilty or increase the severity of the sentence imposed." [95 Congressional Record, 966 (Feb. 8, 1949)].
[42] Uniform Code, art. 20.
[43] Id., art. 15.
[44] Articles for the Government of the Navy, art. 24.

to provide that if such punishment is refused the accused may be tried only before a special or general court martial.

As to the general court martial, the Uniform Code requires the appointment of a law officer who shall sit with the court in open sessions, but who shall not retire with the court when it closes to consider its findings and sentences. The law officer is required to be a member of a bar of a Federal court or of the highest court of a State of the United States and must be certified to be qualified for such duty by the Judge Advocate General of the armed force of which he is a member.[45] He is charged with the duty of ruling on all questions which may arise during the course of the trial, except challenges and interlocutory motions for a finding of not guilty or relating to the sanity of the accused—and these rulings, for the first time in the history of our court-martial system, are not subject to being overruled by majority vote of the members of the court.[46] It is also his duty to instruct the court as to the applicable law,[47] but he has no part in the considerations or the voting of the court on the findings and sentence.[48] In other words, the judge and the jury in civilian courts are paralleled by the law officer and the members of the court in the court-martial system.

The provisions for review are greatly simplified and for the first time in the history of this country, if the code becomes law, the final appellate court of the armed services will consist of civilians. This court is denominated the Judical Council and it is provided that it shall be composed of not less than three members, each to be appointed by the President from civilian life, each of whom shall be a member of the bar admitted to practice before the Supreme Court of the United States and each of whom shall receive compensation and allowances equal to those paid to a judge of a United States Court of Appeals.[49] It is provided that the Judicial Council shall review the record in the following cases:

1. All cases in which the sentence, as affirmed by a Board of Review (the intermediate reviewing authority), affects a general or flag officer or extends to death.
2. All cases reviewed by a Board of Review which the Judge Advocate General orders forwarded to the Judicial Council for review; and
3. All cases reviewed by a Board of Review in which, upon petition of the accused and on good cause shown, the Judicial Council has granted a review.

Provision is made for the representation of the United States and the accused by appellate counsel.[51]

For the first time, also, a continuous surveillance and review of the workings of the court-martial system is provided in this Code and the Judicial Council and the Judge Advocates General of the Armed Forces are charged with this duty.[52]

With all the excellent work of the Forrestal committee it has not, as has been pointed out, touched the fundamental problem of command control and, as has been well stated:[53]

"Only by withdrawing from command the power to influence the court can we be sure that it will not be exercised in the future as it has been in the past."

What are the arguments advanced in justification of the retention of this power? The primary contention dates back to the publication in 1886 of Winthrop's Military Law and Precedents, which was for many years the Army's bible with respect to military law. Colonel Winthrop said:[54]

"Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact, simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.

"Thus indeed, strictly, a court-martial is not a court in the full sense of the term, or as the same is understood in the civil phraseology. It has no common-law powers whatever, but only such powers as are vested in it by express statute,

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[45] Uniform Code, art. 26.
[46] Id., art. 51b.
[47] Id., art. 51c.
[48] Id., art. 26.
[49] Id., art. 67a.
[50] Id., art. 67b.
[51] Id., art. 70.
[52] Id., art. 67g.
[53] Letter dated November 22, 1948, from the chairman of the committee on military justice of the American Bar Association, the Association of the Bar of the City of New York, the New York County Lawyers Association, and the War Veterans Bar Association, addressed to the Committee on a Uniform Code of Military Justice.
[54] 1 Winthrop, Military Law and Precedents 53–54 (1886).

or may be derived from military usage. None of the statutes governing the jurisdiction or procedure of the 'courts of the United States' have any application to it; nor is it embraced in the provisions of the VIth Amendment to the Constitution. It is indeed a creature of *orders*, and except insofar as an independent discretion may be given it by statute, it is as much subject to the orders of a competent superior as is any military body or person. [Italics in original.]"

This line of reasoning has been more succinctly stated in the maxim, "Discipline is a function of command," and it has been argued that, since the commanding general is responsible for the welfare and lives of his men, he must also have the power to punish them and consequently the courts appointed by him should carry out his will.[55]

Yet even Colonel Winthrop recognized that courts martial were under obligation to render justice in accordance with the fundamental principles of law and without partiality, favor, or affection.[56]

"Notwithstanding that the court martial is only an instrumentality of the executive power having no relation or connection, in law, with the judicial establishments of the country, it is yet, so far as it is a court at all, and within its field of action, as fully a court of law and justice as is any civil tribunal. As a court of law, it is bound, like any court, by the fundamental principles of law, and, in the absence of special provisions on the subject in the military code, it observes in general the rules of evidence as adopted in the common-law courts. As a court of justice, it is required, by the terms of its stautory oath (art. 84) to adjudicate between the United States and the accused 'without partiality, favor, or affection,' and according, not only to the laws and customs of the service, but to its 'conscience,' i. e., its sense of substantial right and justice unaffected by technicalities. In the words of the Attorney General, courts martial are thus 'in the strictest sense courts of justice.'"

Despite the origins of the courts-martial system, no officer in a position of authority has been found who contends that command has or should have the power to dictate the findings and sentences of the courts. Indeed, the War Department included in the original version of the Elston Act the provision referred to supra, page 271, which forbids the censure or reprimand of a court with respect to its findings or sentence and any attempt to coerce or unlawfully influence the action of a court martial. The opponents of provisions seeking to remove command control argue, instead, that the instances of command pressure were so insignificant as to be unworthy of notice and that no change in the method of appointing courts and counsel is necessary. In an article in the Virginia Law Review, the present Secretary of the Army, Kenneth C. Royall, said.[57]

"The War Department feels that the Committee received a rather exaggerated impression of the prevalence or seriousness of pressure exerted on courts martial. However, there were doubtless instances where appointing authorities entirely misconceived their duties and functions and overstepped the bounds of propriety."

The point remains that if the defense establishment is sincere in its disclaimer of any desire of command to dominate the military courts, it should have no hesitancy in removing the powers of appointment and review from the commanding general and placing them in the independent Judge Advocate General's Corps, the Army's legal arm charged with administration of the court-martial system, and in similar departments which should be established in the other services.

It must not be assumed that the maintenance of discipline requires command control of the courts. On the contrary, the Army's own definition of discipline indicates that such control tends to weaken discipline by adversely affecting morale. The Army has defined discipline as "* * * an intelligent, willing obedience" [58] and, as command control of courts martial is "subversive of morale," [59] it is also subversive of discipline.

As one general officer stated to the War Department Advisory Committee on Military Justice: [60]

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[55] Rept. War Department Advisory Committee Military Justice, 7 (1946).
[56] 1 Winthrop, Military Law and Precedents, 61–62 (1886).
[57] 33 Va. L. Rev. 269, 275 (1947).
[58] Army Field Manual 22–5, February 1946, p. 5.
[59] Rept. War Department Advisory Committee on Military Justice, 7 (1946): "We think that this attitude is completely wrong and subversive of morale; and that it is necessary to take definite steps to guard against the breakdown of the system at this point by making such action contrary to the Articles of War or regulations and by protecting the courts from the influence of the officers who authorize and conduct the prosecution."
[60] Rept. War Department Advisory Committee on Military Justice, Compilation of Answers, 1 (1946).

"Discipline is maintained by many means, outstanding among which is the proper administration of justice. There is no such thing as a choice between maintenance of discipline and proper administration of justice by the courts martial system. Justice is administered through courts martial in the interest of maintaining proper disciplinary standards."

A second general stated: [61]

"The purpose is to increase an army's ability to fight successfully. It provides orderly procedure for functions of command through administering justice. This is compatible with pure justice, since an unjust application will result in loss of morale and of combat strength."

Despite the statement of Colonel Winthrop [62] that a court martial is not a court, the Supreme Court of the United States said as long ago as 1886, in *Runkel v. United States*, that a court martial organized under the laws of the United States is a court of special and limited jurisdiction.[63] The decisions in the *Yamashita*,[64] *Grafton*,[65] and *Vidal* [66] cases reflect the view of the Supreme Court that courts martial are true courts and are bound to observe that impartiality and independence which are the roots of due process.

In a recent television and radio program, the subject matter of which was the advisability and practicability of taking control of the courts out of the power of command,[67] Col. Frederick Bernays Weiner, one of the leading advocates of the retention of the present system, under cross-examination by Governor Gibson, of Vermont, admitted that despite the prohibition against coercion of the courts it would be quite possible for a commanding general who had been displeased by the findings or sentence of a court martial to reduce the efficiency ratings and thereby adversely affect the military careers of the officers who served on that court. Colonel Weiner's only answer to the problem was that such conduct, although probably not provable, would constitute a violation of the Articles of War and that there was no way in which individuals could be prevented from breaking the law.

The truth is that individuals can be prevented from breaking the law by putting it out of their power to do so. If the appointment of the courts is taken from command and placed in the judicial arms of the armed services, the judge advocates of the Army and Air Force and the legal specialists of the Navy, there will be little opportunity for any violation of the prohibition against coercion of the courts.

The present Articles of War and the provisions of the proposed Uniform Code both place the power to convene general courts martial in the President of the United States, the Secretaries of the Departments of the Army, Navy, and Air Force, and commanding officers down the line to the commanding officer of a separate brigade or naval station or of a separated wing of an Air Force.[68] In addition, there is a catch-all provision to take care of unusual situations or the exigencies of wartime by which a general court martial may be convened by any commanding officer designated by the Secretary of a Department or the President.

A single change in the pending legislation is required to effect the divorce so urgently needed, viz, the designation of the senior officer of the Judge Advocate General's Corps, or legal specialist attached to an Army or higher command, or the corresponding units of the Navy, the Air Force, and the Coast Guard, to act as convening authority in lieu of the commanding officer. The power of the President and of the Secretary of a Department to convene courts martial should be retained and, in order to preserve the same flexibility which now exists, it should also be provided that the Secretary of a Department or the President should have the power to designate any officer of the Judge Advocate General's Corps and any legal specialist to act as convening authority.

In each instance the convening authority would appoint the law officer and the defense counsel and would appoint members of the court from a panel designated by the commanding officers of echelons at or below the level of the convening authority. In normal course the court would be appointed from officers of the division or the corresponding Navy or Air Force unit to which the accused

[61] Ibid.
[62] Supra, p. 276.
[63] See 122 U. S. 543, 555 (1886).
[64] See *In re Yamashita*, 327 U. S. 1, 8 (1945).
[65] See *Grafton* v. *United States*, 206 U. S. 333, 347 (1907).
[66] See *In re Vidal*, 179 U. S. 126, 127 (1900).
[67] "On Trial," February 10, 1949.
[68] A. W. 8; Uniform Code, art. 22.

belonged, but, where circumstances indicated that a fair trial could not be obtained from among the officers so designated, the convening authority could order a trial by a court consisting of officers assigned to a different or higher unit. The only instances in which this extraordinary procedure would be required would be those in which the convening authority believed that command was attempting to influence the court or those in which feeling in the accused's command was so strong that a fair trial might not be obtainable from a court consisting of officers of that command.

Commanding officers would retain the power to control the prosecution by being vested with the power to refer cases to trial and to appoint the trial judge advocate. Command would also be given the right to review the record for the purpose of exercising clemency, but the reviewing power now vested in the commanding general as convening authority would be transferred to the member of the Judge Advocate General's Corps or legal specialist who appointed the court.

These are the precise recommendations made by Secretary of War Patterson's Advisory Committee on Military Justice.[69]

It would probably not be practicable to extend this system of appointing courts to special courts martial where legal officers may not be available, but it is certainly true that any court which has the power to sentence a man to death, or to confinement and hard labor for a period of years up to life, or to dismiss or discharge him in disgrace from the armed services should be made completely free from outside influence of any kind. In special circumstances or in time of war it may be necessary to designate temporarily a judge advocate or legal specialist to a distant or isolated command, but this inconvenience is small compared to the damage to morale which results from the belief held by so many military and naval personnel that the courts exist to carry out the wishes of the commanding officer and that justice is not to be expected from them.

The situation in the armed services is far different today than it was when professional soldiers and sailors constituted the armed forces. During the past two World Wars the United States has had a citizens' Army and Navy. The Military and Naval Establishments now consists of upward of 2,000,000 men and women, many of whom are citizens who, though they serve their country willingly, would not voluntarily have selected the armed services as their sphere of occupation.

These citizens should not lose their right to a fair trial by an impartial court because they are in the service of their country. Nor is it in the interests of their country that they have no faith in the justice of its military tribunals.

"It is an essential to the preservation of morale that the personnel of the armed forces believe the system to be fair, as that it be administered fairly." [70]

The power given to the Congress by article I, section 8 of the Constitution, to make rules for the government and regulation of the land and naval forces should be so exercised as to insure an administration of military and naval justice in accordance with the fundamental requirements of the American concept of justice.

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AMENDMENTS TO UNIFORM CODE OF MILITARY JUSTICE (INTRODUCED AS H. R. 2498) SUGGESTED BY THE COMMITTEE ON MILITARY JUSTICE OF THE AMERICAN BAR ASSOCIATION TO FREE GENERAL COURTS FROM COMMAND DOMINATION

Article 1. Definitions: Add two new definitions to be numbered and read as follows:

"(15) 'Appointing authority' shall be construed to refer to a commanding officer authorized to appoint a summary court or a panel of military personnel from whom shall be designated the members of general or special courts-martial.

"(16) 'Convening authority' shall be construed to refer to those persons and officers authorized to designate the military personnel to serve as members of general or special courts-martial. Wherever in these articles reference is made to an officer exercising general or special court-martial jurisdiction, such reference shall be construed to mean the convening authority with power to designate the members of such court-martial."

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[69] Rept. War Department Advisory Committee on Military Justice, 9 (1946).

[70] Letter of the chairman of the Committees on Military Justice of the American Bar Association, Association of the Bar of the City of New York, New York County Lawyers Association, and War Veterans Bar Association, dated November 22, 1948, addressed to the Committee on a Uniform Code of Military Justice.

Article 6, subdivision (b), first word "convening" to read "appointing."

Article 15. Commanding officers' nonjudicial punishment, subdivision (a) (1) (C) : Strike present paragraph and revise to read:

"(C) if imposed by an officer authorized to exercise appointing authority with respect to general courts-martial, forfeiture of one-half of his pay per month for a period not exceeding three months."

Article 15 (a) (2) (G), strike paragraph and substitute the following:

"(G) if imposed by an officer authorized to exercise appointing authority with respect to special courts-martial, forfeiture of one-half of his pay for a period not exceeding one month."

Article 22. Who may convene general courts-martial: Subdivision (a) (3) (4) (5) (6) (7), strike paragraphs and substitute the following:

"(3) the senior member of the Judge Advocate General's Corps attached or assigned to a territorial department an army group or an army, and such other member of The Judge Advocate General's Corps as may be designated by such senior member;

"(4) the senior legal specialist attached or assigned to a fleet or to a naval station or larger short activity of the navy beyond the continental limits of the United States;

"(5) the senior Judge Advocate attached or assigned to an air command or an air force, and such other Judge Advocate as may be designated by such senior Judge Advocate;

"(6) such other members of The Judge Advocate General's Corps, legal specialist or Judge Advocate as may be designated by the appropriate secretary of a department; or

"(7) any other member of the Judge Advocate General's Corps, legal specialist or the Judge Advocate in any of the armed forces when empowered by the President."

Subdivision (b) to read:

"(b) when any such convening authority is an accuser, the court shall be convened by superior competent authority and may in any case be convened by such authority when deemed desirable by him."

Article 23 (a) (3) (4) to read:

"(3) the commanding officer of an army corps, a division, a brigade, a regiment, detached battalion or corresponding unit of the army;

"(4) the commanding officer of an air division, a wing, group or separate squadron of the air force;"

Article 25, title which now reads "Who may serve on courts-martial" changed to read "Qualifications and appointment of members of courts-martial."

Article 25, subdivision (c), last sentence which now reads "Where such persons cannot be obtained, the court may be convened and the trial held without them but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained." shall be amended to read as follows: "Where such persons cannot be obtained the court may be convened and the trial held without them, but the appropriate commanding officer, whether the appointing authority or the convening authority, shall make a detailed written statement, to be appended to the record, sating why they could not be obtained."

Article 25 (d) (2) should be amended to read as follows:

"(2) The President of the United States, the Secretary of a Department, and commanding officers, shall appoint as members of courts-martial, and of panels from which general and special courts-martial shall be designated, such persons as, in their opinion, are best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament. No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case."

Add at end of article 25 a new subdivision (e) to read as follows:

"(e) the commanding officers enumerated in subdivisions (2), (3), (4), (5), and (6) of Article 23 (a) shall appoint qualified military personnel in their commands available for service as members of general and special courts-martial and shall forward a list of such personnel to the convening authority having general court-martial jurisdiction of their command, and such personnel shall constitute a panel from which the convening authority shall from time to time designate the members of general and special courts-martial. Such commanding officers may withdraw names from such lists and may substitute others therefor, subject to the provisions of Article 29 (a)."

Article 27 (a) to be omitted and in place thereof the following to be substituted:

"(a) (1) for each general court-martial the authority convening the court shall appoint a defense counsel together with such assistants as he deems necessary or appropriate. Each appointing authority, or if the court be convened by the President of the United States or the Secretary of a Department, then such person, shall appoint a trial counsel together with such assistants as he deems necessary or appropriate, who shall prosecute the charges originating in his command;

"(2) for each special court-martial the authority convening the court shall appoint a trial counsel and a defense counsel, together with such assistants as he deems necessary or appropriate;

"(3) no person who has acted as investigating officer, law officer, or court member in any case shall act subsequently as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, a defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case in the prosecution."

Article 33 shall be amended to read as follows:

"When a person is held for trial by general court-martial, the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the appointing authority for the command. If the same is not practicable, he shall report to such officer the reasons for delay."

Article 34 (a) to be amended to read as follows:

"(a) before directing the trial of any charge by General Court-Martial the appointing authority for the command shall refer it to his Staff Judge Advocate or legal officer for consideration and advice. The appointing authority shall forward the charge to the convening authority, who shall thereupon refer the charge to the trial counsel appointed by such appointing authority, for prosecution before a general court-martial designated by the convening authority. The convening authority shall not refer a charge to a general court-martial for trial unless it has been found that the charge alleges an offense under this code and is warranted by evidence indicated in the report of investigation."

Article 37, last sentence, shall be amended to read as follows:

"No person subject to this code shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any appointing, convening, approving, or reviewing authority with respect to his judicial acts."

Article 60, after title, should be amended to read as follows:

"(a) after every trial by a general court-martial, and after every trial by a special court-martial convened by a member of the Judge Advocate General's Corps, a legal specialist, or a Judge Advocate, the record shall be forwarded to the convening authority, and action thereon shall be taken by him or by his successor. The convening authority shall, unless he shall disapprove the sentence or order a re-hearing, forward the record, and if the record be of a trial by general court-martial, then with his written opinion and review thereof, to the appointing authority who forwarded the charge to him, or to such officer's successor in command, and the latter may litigate, remit or suspend the whole or any part of the sentence;

"(b) after every trial by a court-martial except as specified in subdivision (a) the record shall be forwarded to the convening authority and action thereon may be taken by the officer who convened the court, an officer commanding for the time being, a successor in command, or by any officer exercising general court-martial jurisdiction."

Article 61, omit entirely first sentence which now reads: "the convening authority shall refer the record of every general court-martial to his Staff Judge Advocate or legal officer who shall submit his written opinion thereon to the convening authority." Balance of Article 61 as it now is.

Article 65, subdivisions (a) and (b) to be amended to read as follows:

"(a) when the convening authority and the appointing authority have taken final action in a general court-martial case, the appointing authority shall forward the entire record, including the action and the opinion and review of the

convening authority, and any order which the appointing authority may have made pursuant to Article 60 (a) to the appropriate Judge Advocate General;

"(b) where the sentence of a special court-martial as approved by the convening authority includes a bad conduct discharge, whether or not suspended, and such discharge shall not have been remitted by the appointing authority, the record shall be forwarded to the officer exercising general court-martial jurisdiction over the command to be reviewed in the same manner as a record of trial by general court-martial or directly to the appropriate Judge Advocate General to be reviewed by a Board of Review. If the sentence as approved by an officer exercising general court-martial jurisdiction includes a bad conduct discharge, whether or not suspended, the record shall be forwarded to the appropriate Judge Advocate General to be reviewed by a Board of Review."

Article 72, the word "officer" appearing in line 4 of subdivision (a) should be amended to read "commanding officer".

The first sentence of article 72, subdivision (b), should be amended to read "the record of the hearing and the recommendations of the commanding officer having special court-martial jurisdiction shall be forwarded for action to the commanding officer exercising general court-martial appointing authority for the command." The remaining two sentences of article 72, subdivision (b), to remain as now.

Mr. SPIEGELBERG. I have here an additional number of copies if any other members of the committee would be interested in them which are incomplete only to the extent that they have not got the action of the American Bar Association as an annex nor have they the proposed amendments. In all other respects they are complete.

Perhaps I should say by way of introduction, that I am a veteran of both World Wars I and II, and that in the latter war I served overseas for 30 months as a staff officer, the last 15 months of such service having been on General Eisenhower's staff; that I was retired from the service for line of duty physical disability and for a year and one-half prior to my retirement I held the rank of colonel, General Staff Corps.

I have been a member of the bar of the State of New York since 1922 and a professor of law at New York University since 1924. I am now engaged in the practice of law in New York City.

I would like to say that in many ways the proposed code of military justice is a long step forward. It contains many desirable features. In my opinion, the most desirable is the creation of a civil court of military appeal.

The reason why I think that we can place so much hope in the creation of that court is that the bill provides that a function of the court will be a continuous review of the workings of the bill, and an obligation to report to the Congress on the results which they believe the bill has achieved, as well as with respects to amendments which they feel are necessary from time to time. I believe that to be of great importance because it is the first time that we have had an opportunity for a continuing civilian review of military justice.

It was one of the main recommendations of the War Department Advisory Committee which was constituted under the chairmanship of Chief Judge Vanderbilt of New Jersey, and I sincerely hope that this committee, and eventually the Senate and the Congress will not allow any amendments to emasculate that provision.

Now, when we have said all the good things that we can say about this proposed code, there remains, unfortunately, the fact that the most vital defect in military justice remains completely uncured. I refer to the fact that the court is completely under the domination and subservience of the commanding officer. I would like to direct

the committee's attention to the fact that, as a result of this, there was an outcry after World War I, an outcry which resulted in certain reforms but not in the essential reform of checking the influence of command over the court.

During the intervening years of peace, there was no outcry, because it is only when you put the machine to the stress and strains of a war that you encounter the difficulties that bring to light the defects in the legislation concerning military justice.

World War II came, and as a result very largely of the prevalence of command control, we had a repetition on a magnified scale of the evils of World War I, and it is as a result that arose after World War II that this and similar legislation has been drafted and is now before this committee and the Senate for consideration.

I would like to direct the attention of the committee to the report of the War Department's Advisory Committee on Military Justice, which was filed with the Secretary of War, having been appointed by him on December 13, 1946, now two and a half years ago.

In the specific recommendations that that committee made to the War Department, the first four and a half of seven pages of recommendations are taken up with the recommendation that command control courts be checked.

I would like very briefly to quote two sentences from pages 6 and 7 of that report:

> The committee is convinced that in many instances, the commanding officer who selected the members of the court made a deliberate attempt to influence their decisions. It is not suggested that all commanders adopted this practice, but its prevalence was not denied and indeed in some instances was freely admitted.

Parenthetically, I would like to say at this point that in the addenda to that report is the statement that of 49 general officers examined, 14 frankly stated that they felt it was part of their duty to influence the verdict of general courts martial. I think, perhaps, it is not out of place to inquire if 14 frankly believe that it was their duty, a substantially large number may have indulged in the same practice.

Again, quoting the second sentence from page 7 of the report:

> The close association between the commanding general, the staff judge advocate and the officers of his division, made it easy for members of the court to acquaint themselves with the views of the commanding officer.

Now, I would like, if I may be so bold as to ask the committee to remember that last sentence, because I am going to refer to it again in discussing the present code and how it attempts to solve this question.

First, and perhaps I am talking on a subject that needs no further explanation, just briefly to review for the benefit of the committee the manner in which the court is selected: Today, the average convening power of a general court martial, particularly in time of war in a foreign theater, which, I may say, is where the majority of the evils of which we complain occur, is a divisional commander. As a matter of fact, and I am now going perhaps behind the surface of the law, the commanding general appoints or controls the appointment of the trial judge advocate who is the prosecutor, of the assigned defense counsel, who represents the defendant; and of the court which tries the man accused of crime.

That court is chosen exclusively from members of the commanding officer's command. They look, properly and necessarily, to the com-

manding officer for promotion, for assignment, for efficiency ratings, and for quarters. Indeed, it is no exaggeration to say that their future in the Army is entirely dependent on their commanding officer's good will.

Now, if it please the committee, that situation, so long as it is allowed to exist, carries in it the germ of injustice. Without, in any way, violating any rule or regulation that can be made, the commanding officer who appoints the court can let the court understand what he wants done, and it will be done, and it has been done in the past, and until you take that power away from the commanding officer it will be done in the future. Great and patriotic men in this country are opposed to the reform which we urge. General Eisenhower, former Secretary of War Robert P. Patterson take the position that you must not deprive the commander of the right to select the court, and their argument, as I understand it—and I have heard both of them make it—is that winning of wars is the function of an army. With that statement, I heartily agree. They say further that discipline is a function of command. I agree with that, too. They, therefore, conclude that you must allow the commanding officer to appoint the court from members of his command. There I disagree.

It seems to me that that conclusion is a complete nonsequitur, and I ask the committee's leave to analyze what these gentlemen are really saying. Is a perversion of justice a necessary concomitant of discipline? Now, when I say "perversion of justice," I mean is it necessary in order to enforce discipline that a commanding officer should tell his court what decision or what sentence he desires in a particular case? I think the committee will agree with me that if he does that, it is a perversion of justice.

Is it necessary, to make my second rhetorical question, to give an enlisted man an unfair trial in order to enforce discipline? I do not believe so. I do not believe it is any more necessary to give an enlisted and unfair trial than it is to have the commanding officer influence the court regardless of the evidence submitted to the court.

If we agree, and I do not see how we can disagree, that neither of these two thing is necessary to enforce discipline, why does command insist upon retaining the power to appoint the court? It seems to me that when you give the commanding officer the right to refer the charge, which he has, to appoint the prosecutor, a right which he has and which he needs in order to see that there is a speedy trial, and when you give him the further right of reviewing the sentence inflicted by the court solely for the purpose of exercising clemency, which is also a function of discipline, you then have satisfied all that discipline can demand; and if you go further, and, as you now do, allow him to dominate the court, you tend to destroy discipline rather than to enforce it.

I would like to point out to this committee that under the Elston Act, the commanding officer is prohibited from influencing the court. Under this proposed code, he is not merely prohibited from influencing the court, but it becomes a court-martial offense under article 98 for the commanding officer to attempt to influence the court. It, therefore, apparently——

Senator KEFAUVER. Article 98 is written into the bill as article 37, I believe.

Mr. SPIEGELBERG. Well, I only have before me—or rather I have before me the uniform code of military justice, and article 37, if it please the chairman, is unlawfully influencing the action of the court, and prohibits it, and article 98 makes a violation of that prohibition a court-martial offense.

I point that out to the committee, because under the Elston Act, while we had a facsimile of article 37, we had no enforcement provision, which is in the present proposed code and appears in section 98.

The distinction that I drew, if it please the chairman, is that whereas before we had the prohibition, we now have the prohibition with teeth.

Now, if the Congress feels sufficiently strongly on this question to make its violation a court-martial offense, why do they not make the prohibition effective? Because, as I said before, without in any way violating article 37 or 98, any commanding officer who desires to do so, can influence the verdicts of the court in accordance with his desires. And still command clings to a right, the exercise of which is made a court-martial offense, and the presence of which in their hands is the greatest threat to morale that I know of.

Now, what is the remedy? The remedy is simple, and it is not revolutionary. We do not suggest that the trial of general courts martial be taken out of the hands of the military. In fact, we insist that that is where it belongs, but we say there should be opportunity, and I would like to stress and underline the word "opportunity" to take the selection of the court away from the commander in those cases in which the commander, for whatever reason, tries to influence the court.

We do it very simply, and without interfering with command function or with discipline. We suggest that the appropriate commanding officer make available a panel of officers in his command, who are available for court-martial duty; that he make that panel available to the judge advocate general's officer in the area occupying the highest command and never in a foreign theater below corps.

Taking that as an illustration, we will assume an Army corps of three divisions. The commanding officer of the three divisions will make his list or panel of officers available to the corps judge advocate general. From that list the corps judge advocate general will select the number of general courts that are called for. In that way, where necessary, and only where necessary, there can be sent into the command to try cases in that command a court composed of officers from a command other than that in which the man is to be tried.

Now, I hope I make that clear. It is not, as a practical matter, difficult to put into operation; and even if it were difficult, it seems to me that the difficulty would not be too high a price to pay in order to gather greater insurances of a fair trial to those officers and enlisted men who may be charged with crime.

In the usual case there would be no change from the present system. It would be in the case where there has been an indication by the commanding officer that he does and intends to continue to influence his court that the Judge Advocate General would step in and would send into that area or division a court composed of officers from another division.

Senator KEFAUVER. Mr. Spiegelberg, how do you know that that situation has arisen or how would you know? There might be some

evidence of inclination to influence the action of the court on the part of the commanding general; how would you know that?

Mr. SPIEGELBERG. How would he become aware of it?

Senator KEFAUVER. Yes.

Mr. SPIEGELBERG. Well, as the chairman knows, each commanding officer, divisional commander, has a staff judge advocate.

Senator KEFAUVER. Yes.

Mr. SPIEGELBERG. The Elston Act has already established the independent chain of communication for that officer. He and any other officer in the command, will be aware very quickly when a commanding officer is undertaking the—I will not use the word "influence"—instruct his court in the verdicts that he thinks should be brought in, without in any way violating article 37.

In that situation, it seems to me the staff judge advocate would get in touch, as he is required to do, with higher authority in the judge advocate general's department, and as soon as he did that, the higher authority would start sending corps into that particular command chosen from other commands.

There never is—I can assure the chairman from personal experience—any difficulty in determining when you are in an area or a division in which command is undertaking to dominate the court.

Senator KEFAUVER. Well, the point I wish though is what position does it put the staff judge advocate in to complain that his commanding officer is——

Mr. SPIEGELBERG. Well, it is no longer his commanding officer under the new set-up. His commanding officer is in the Judge Advocate General line. Now, it is perfectly true that he is the staff judge advocate to the divisional commander and he must be acceptable to him, but he is not responsible to that commanding officer under the existing Elston Act for efficiency ratings or for promotion, and he is subject, so far as those things are concerned, to the Judge Advocate General's line of command. That was the first great struggle to make the courts independent, which was successful in the Elston Act. That was one-half of the picture.

Now, we need the other half of the picture in order to complete the opportunity—I will not say the opportunity—I will go further than that—the probability of a fair trial for the enlisted men in the services.

Now, in conclusion—Have I answered your question, Mr. Chairman, satisfactorily?

Senator KEFAUVER. Well, I know that his future is not dependent to the same degree upon the good will of the commanding officer as are other officers under the commanding general, but still it is better for him to get along with his commanding officer.

Mr. SPIEGELBERG. There is not any question about that; and I assume that in most cases he will, but I assume also that he will undertake to do his duty with reasonable fidelity and, I think, the chances of his doing it are much greater when he no longer has to depend on the commanding officer for efficiency and promotion.

Senator KEFAUVER. May I ask also which amendments in the second exhibit that you filed with your statement take care of this problem?

Mr. SPIEGELBERG. All of them. Now, there is one—the chief one is where for the first time we have something which divides the convening authority into an appointing and convening authority, and all

the rest of those amendments are necessary changes in verbiage in other sections of the bill to carry out this panel system that I have just stated to the committee.

Senator KEFAUVER. So, all of these amendments relate to this one suggestion?

Mr. SPIEGELBERG. It carries out the suggestion which I have tried to state as briefly as possible, and the fact that they are so numerous is caused by the fact that the amendment of the basic section requires changes in verbiage in a great number of other sections in the code, but it only affects that one change.

Now, in conclusion, I would like to say this to the committee, if I may. I suggested at the outset that we had a hue and cry after World War I and then silence until the machine was put to the stresses and strains of World War II, and then again an outcry, but in greater volume.

There is something, it seems to me, wrong with the system which results in a clemency board, established in Washington, reducing or remitting over 27,000 sentences. I think the trouble with that system lies in the fact of the opportunity of command to dominate the control of the courts. I say I think that from observation. I was not a legal officer in the last war, but from observation I know that to be true. I see no reason why it should not be corrected now.

If it is not corrected now, I am convinced that there will be no further outcry until the next war, because in peacetime we are not troubled with the evils of the system which are exposed only in wartime.

We have had two great wars. We have had exactly the same vice exposed in both those wars.

Now, how long do we have to wait before we take the necessary steps to correct that weakness? I hope that this committee will say that we do not have to wait until after the next world war.

Senator KEFAUVER. Senator Morse.

Senator MORSE. First, Mr. Chairman, I want to apologize to you, in particular and also to the witnesses for not only coming late this morning but not being able to be here the other day at all. It just happens that this hearing has come in the midst of a very controversal problem in connection with the Labor Committee, which has received first importance, so far as I am concerned, necessarily so, because of my connection with labor legislation.

Senator KEFAUVER. We appreciate your coming here today.

Mr. MORSE. I want to ask this witness one or two questions. Perhaps, I ought to first address my question to the staff rather than to this witness, but I want to know if there has been prepared a parallel column brief showing the agreements and disagreements between the bill which was passed last year, the American Bar Association proposals, and H. R. 4080, which is now under consideration.

It seems to me that one of the first things this committee should have is a parallel column brief showing those differences.

Mr. GALUSHA. Senator, I have started a study comparing this bill, H. R. 4080, with the bill which was originally introduced, S. 857. I have started one with a comparison. I am working that up now.

I now have the recommendations of the American Bar Association, which Mr. Spiegelberg has suggested here today which will be included in the study, and will be available for the committee.

Senator MORSE. Now, my second inquiry goes to the witness: Am I correct in my undestanding—and I have not studied it in any detail yet—that the principal feature of the American Bar Association recommendation goes to a change in the authority of the commanding officer over the military justice procedure under his command?

Mr. SPIEGELBERG. And to be specific, the appointment of the court and of the defense counsel.

Senator MORSE. My next inquiry is, what rebuttal do you have to the oft-repeated argument of the military that the existing control of the commanding officer is necessary in order to maintain discipline?

Mr. SPIEGELBERG. Well, I tried, Senator Morse, to cover that before. It seems to me that granting an enlisted man or an officer in the service of this country a fair trial cannot be an interference with discipline. I think the statement is almost self-probative.

The only possible reason for leaving with the commanding officer the right to influence the court is to influence it incorrectly, because the court consists of officers, and we must assume that they are the people who are hearing the evidence, and they are instructed as to the law, and I see no reason why giving the commanding officer, just because he is the commanding officer of those men, the right, in substance, to tell them what to do in a given case or cases, can in any way assist in the enforcement of discipline unless we admit that a fair trial militates against discipline, and I just do not believe that is true, and I do not believe that anybody will say it is true.

Senator MORSE. Now, you use the term "fair trial." Do you imply that not only should the authority of the commanding officer over the procedure of the court martial be removed, but that the procedures of the court martial itself should be changed in the direction of setting up comparable, and in some respects, identical procedure to civilian trials?

Mr. SPIEGELBERG. As to the latter part of your question, Senator, no.

Senator MORSE. Why not?

Mr. SPIEGELBERG. Because the trials of civilians in time of peace are not the same as the trial of soldiers, sailors, and airmen in time of war. There must necessarily be a certain giving up of constitutional guarantees.

Senator MORSE. Why?

Mr. SPIEGELBERG. Because it would be impossible, for instance in a foreign theater, to have a civilian jury sit in case of an enlisted man or an officer charged with crime in that theater. For one reason you could not find the jury. You could not find 12 civilian Americans who would be acceptable.

I feel most distinctly that we must not make a civilian court out of a court martial. I do not think it ever was intended to be. I think we should make a military court that will dispense justice so nearly as possible. I do not know whether I have answered your question or not.

Senator MORSE. You have given me a point of view, but I want to press it a little bit if I may.

Mr. SPIEGELBERG. I wish you would.

Senator MORSE. I agree with you that court martial of which we are speaking was never intended to meet the same standards of civilian justice that we have in the civilian criminal courts, for example, but historical as that argument may be, and bewhiskered as it may be, it

does not impress me very much if the time is coming when we ought to change the original purpose of military justice. I am not saying I favor it or I do not favor it. I simply say that to date I think that the Military Establishment has completely failed, in my opinion, to justify what I think is a system of justice that cannot be reconciled, in view of modern conditions, with the rights of citizen soldiers, either in time of peace or in time of war. I am open to conviction that in time of peace there is any justification, in view of the fact that we now have to maintain in the Military Establishment thousands upon thousands of men in excess of what we ever contemplated would be maintained in uniform in this country—I am open to conviction that in time of peace there is any justification for the type of military justice procedure that is now being imposed upon those men.

It was not so long ago that we were even confronted with the possibility of keeping thousands of young Americans in the Army for a period of time under a draft. I voted for the draft, and I will vote for it again under similar circumstances; but I will not vote for maintaining over those men a system of military justice that has prevailed in the past because, I think, we have gone far beyond that period of time. No group of military officers should have any such control over the rights and freedom of citizens that military justice gives to them.

I think that the military is just lucky that public resentment has not reached higher proportions than it has reached in regard to military justice. I think it is time to clean house on military justice, and get back to some very fundamental constitutional guaranties which, I judge from your remarks, you are inclined to think we have to forego because you put on the uniform of your country. I do not share that view at all.

I recognize that there are some practical difficulties in a war theater in giving some of these guaranties, but those difficulties do not exist on American soil, and they have not existed in occupied Germany. We have had plenty of civilian personnel in occupied Germany to give us, if we wanted to use them, civilian juries, and so I want to say at the outset, I am very much in favor of the American Bar Association's recommendation in regard to delimiting the power of the commanding officer, because I have got a file over here in my office on this court-martial matter that is shocking in regard to what I think are abuses and evils that have developed by giving any such power to a commanding officer. I think it must be removed.

But I think you have got to go further than that, and I want to get your point of view on rules of evidence, for example. If a man is charged with a crime, why should we not make certain that he will be guaranteed the same evidentiary rights that he is guaranteed in a civilian court?

Mr. SPIEGELBERG. Under the Manual for Court Martial, Senator Morse, he is.

Senator MORSE. Do you think he is in practice?

Mr. SPIEGELBERG. Well, that is a different matter. I would like to say, Senator, that, after 3 years of toiling in the mines of military justice, I have had this morning the cockles of my heart warmed more by what you have said than at any time in the last 3 years of efforts; that I agree heartily with it.

At the same time, I think that in this field, perhaps only because of its antiquity, we should make progress slowly. I think that the first great step is the one the American Bar Association has advocated. I think others will come.

I said to the chairman of the committee at the outset that I thought one of the most helpful things in this proposed code, and one which I feel reasonable sure will be attacked either directly or indirectly, is the creation of a military court of appeal composed of three civilians, and I believe that to be important because one of the duties with which they are charged is a continuing review of military justice and an annual report to the Congress, something that has never happened before; and there, I think, is the seed of greater changes, assuming, of course, as I do, that men of ability are placed in those positions.

Senator MORSE. You think there is no case at all that can be made for attaching to military justice, even in time of war, civilian judges?

Mr. SPIEGELBERG. Personally, Senator Morse, frankness compels me to answer that in the negative.

Senator MORSE. Why?

Mr. SPIEGELBERG. Because war is a tough operation, and civilian interference and influence in an actual theater of operations is a deterrent to good military operations and performance.

Senator MORSE. You think they would be soft?

Mr. SPIEGELBERG. No; I do not think they would be soft. I think they would be in the way. Now, I do not mean for a moment that I do not think you might not have a more enlightened justice, but I assume that you are limiting your remarks to a foreign theater of operations in time of war.

Senator MORSE. What stops the civilian from moving right along with the Army, being part of the staff, subject to all Army discipline, save and except his independence in regard to conducting a trial?

Mr. SPIEGELBERG. Then, Senator, he is an officer; he is an officer out of uniform. That is the distinction that I am trying to make. If you make a civilian a part of the Army, you have got to give him a rank.

Senator MORSE. Is that a distinction only of form or might it not very well be, as far as independence is concerned, a distinction of great substance?

Mr. SPIEGELBERG. It might be; but, if he were in that theater for any length of time, I question how often it would be. I am only stating my opinion on this thing, you understand. You have got to give him an assimilated rank; that is a must, because if he has not got an assimilated rank he is not going to get a place to lay his head when he wants to go to sleep. I mean, that is a fact of a theater of operations.

Even a civilian who is let in is let in either as a sergeant or as a lieutenant or as a major general, because that establishes how he is going to eat and sleep.

Senator MORSE. Why cannot you make them subject to all the discipline of the Army as far as every matter is concerned, except the operation of military justice, and make that part of the United States Department of Justice, and say to the Army, "As far as determining the rights of American citizens, we are going to use civilian procedure for that."

Mr. SPIEGELBERG. It is a new thought. I can only give you my instantaneous reaction. Maybe I will live to see that system in force.

Senator MORSE. I do not think so, but you know sometimes you have to scare them a little bit to get something good.

I do not throw it out just as a scarecrow argument, but I do want to say that I think we are in for a long period of high mobilization in our country, where the rights of millions of Americans over the years are going to come under the control of military justice, and I am of the opinion that it is the duty of Congress to see to it that the principles of that military justice are brought in line in every respect with civilian justice wherever it can be done, save and except where they actually can make a case, on such an argument as you make, that it just is not practicable.

I do not like this idea in this new era in which we are living of building up one justice system here for men in uniform and another one for so-called free citizens. You cannot keep a civilian Army, in my judgment, under two systems of justice. Differences, I recognize there will be, but I think the military has gone entirely too far in the direction of a system of justice that we cannot reconcile with what I think are some basic guaranties of a fair trial.

You mentioned the clemency boards. I think not only what you say is true: That the fact that you have to have these thousands and thousands of modifications by men who looked into the record and found the need for modification, but I think the clemency boards—and I have talked to some members of them—were a little concerned about the fact that they did not find reversals; they did not issue more reversal orders than they issued.

Well, I just wanted to get started as I shall press in these hearings—I wanted to get started; that is why I asked for this parallel-column brief. I want to have the military to prove step by step the justification for every procedure that it uses. If we are going to handle this court-martial business, I say, let us do a thorough job; let us not take our present system and just make a little addition or two here. If we are going to do the job that I think this committee ought to do, I think we have just got to start at the beginning and go to the finish, and make changes wherever we can make a change that will bring the military system in direct line with civilian justice and, at the same time, not interfere with what we can all agree is necessary military organization in order to have an effective fighting force.

That is all I have to ask this witness.

Mr. SPIEGELBERG. May I say to the chairman and to Senator Morse that, for what it is worth, you may count upon the wholehearted cooperation and assistance of the American Bar Association, if we can be of any help.

Senator MORSE. I appreciate that very much, but the last comment I make naturally raises the question as to whether or not you gentlemen in the American Bar Association have gone far enough in giving us the benefit of a comparative study of civilian justice in contrast with military justice, procedural step by procedural step.

You see, I just have a hunch—I have more than a hunch; I have an impression—in talking to military-justice men that they are so steeped in their military-justice training that they have lost sight of the practicality of getting rid of what, I think, are a lot of military procedures that they can dispense with and substitute therefor out-and-out procedures of our civilian criminal courts.

Senator KEFAUVER. Thank you very much, Mr. Spiegelberg.
Mr. SPIEGELBERG. Thank you, sir.
Senator KEFAUVER. Mr. Farmer.

## STATEMENT OF ARTHUR E. FARMER, CHAIRMAN, COMMITTEE ON MILITARY LAW, WAR VETERANS BAR ASSOCIATION

Mr. FARMER. Yes, sir. My name is Arthur E. Farmer. I am chairman of the committee on military law of the War Veterans Bar Association.

I would like to go into a little more detail with respect to——

Senator KEFAUVER. Mr. Farmer, do you have a statement?

Mr. FARMER. The statement which I intended to submit and rely on is the article which I wrote with Mr. Wels, which appeared in the New York University Law Review Quarterly, and that has already been submitted by Mr. Spiegelberg; and I will, therefore, not offer another copy of it, sir.

Senator KEFAUVER. All right, Mr. Farmer. We have the article of April 1949 of the New York University Law Review Quarterly by you and Richard H. Wels.

Mr. FARMER. Yes, sir.

Senator KEFAUVER. Will you proceed, Mr. Farmer.

Mr. FARMER. I would like to go into my, perhaps, somewhat limited military experience a little more in detail than I would have otherwise, because I think I have a rather unique claim to distinction in that respect which usually is not put in that light, and that is that I represent the lower echelons instead of the higher echelons.

I went into the service as a draftee, just as millions of others did. When I went overseas to New Guinea with a chemical-warfare company, it was discovered that the judge advocate's section at Base B at Finchaven, which has jurisdiction over as many as 50,000 men at some time, was curiously inadequately supplies with commissioned officers who were lawyers, and the result was that the prosecutor of the general court martial was not a lawyer, and I was assigned to assist him in preparing the cases, and actually in going into the courts with him and advising him with respect to the law and the questions and the cross-examination and summation. So, my attitude in the court-martial system there was not of an officer but of an enlisted man, although of an enlisted man who had already at that time had some 15 years' experience as a practicing lawyer in New York, both in the Federal and in the State courts.

Thereafter, I went to the Judge Advocate's School at Ann Arbor, and I was commissioned a judge advocate, but I never attained to a greater rank than that of a first lieutenant. I have served on many courts as law member, as trial judge advocate, and since my separation from the service I have volunteered to act as defense counsel.

Now, I would like to say one other thing so that Senator Morse may realize that I do not exactly come here influenced by the military mind, except insofar as any human being is influenced by his experiences.

I felt very strongly about the inadequacies of the military-justice system when I was separated from the service, and I determined at that time that I would engage in the work which brings me here today; and, for that reason and for fear that there might be some

conflict of interest or some string attached to me, I declined my Reserve commission. So, I come here with no ties whatever, and with a point of view of service as an enlisted man as well as service as judge advocate.

I agree entirely with Mr. Spiegelberg that the great and thundering inadequacy of the proposed uniform code is the retention in the commanding officer of the power to appoint the court, to appoint defense counsel for members of his command, and then to turn around, in addition to that, and review the findings.

Now, it is true there is further review, but because I feel that one emphasis that, perhaps, has not been strongly enough made in other hearings has been the importance of morale, the effect of the court-martial system on morale, I would like to say that what happens at the level of the court, at the level of command, is the determining influence on whether the personnel of that command feel confidence in the court-martial system or feel that the court-martial system is just as it was once termed by Colonel Winthrop, "an arm of command."

What happens after that never gets back to the command where the trial was heard. The subsequent proceeding affect only the individual tried, but the results of the trial affect the morale of the whole command.

Now, I would like to emphasize that by two excerpts, which are quite short, from statements made not by malcontents but by general officers of the Army, the evidence being adduced before the War Department Advisory Committee at the time of its hearings throughout the country.

The first of them said this, and it was in response to a question of what effect should be given to the military maxim that discipline is a function of command, and, therefore, command must control the court-martial system. The first of these officers said this:

> Discipline is maintained by many means, outstanding among which is the proper administration of justice. There is no such thing as a choice between maintenance of discipline and proper administration of justice by the court-martial system. Justice is administered through courts martial in the interest of maintaining proper disciplinary standards.

The second general officer said this——

Senator KEFAUVER. Do you have the names, or can they be given?

Mr. FARMER. The names were not given in the report of the committee. What I am referring to is an addendum to the seven-page report of the War Department Advisory Committee which contained a résumé of the testimony given, and the findings.

I assume that the records of the War Department would reveal the names of the officers referred to in that report, and the citation to it you will find in a little law review article that I mentioned.

The second general officer said this:

> The purpose is to increase an army's ability to fight successfully. It provides orderly procedure for functions of command through administering justice. This is compatible with pure justice, since an unjust application will result in loss of morale and of combat strength.

Now, more than that, the Army itself has taken that attitude because in their field manual on military courtesy there is a section devoted to discipline and leadership, and there they define "discipline" as, and I quote, "an intelligent, willing obedience."

Now, if you are going to have intelligent, willing obedience, you will have it because the morale is high, and if the morale is not high, you are not going to have it.

One of the finest ways I know of, and I say this through personal experience as well as through the report of the Vanderbilt committee, the War Department Committee on Military Justice, to destroy morale is for the enlisted personnel and officers to feel that the courts martial are no places in which you can find justice.

Now, when a man goes into court he is as good as convicted, and I have heard officers say, "The accused will not appear before you unless he is guilty. We have had a thorough and impartial investigation of every case, and that will continue, and when a man comes before you, you may assume that lacking extraordinary circumstances, he is guilty."

I have also heard an officer say, and this is not a unique experience, "Gentlemen, when you pass sentence on the accused, you will give him the maxium sentence. Clemency is my function, and I want the men in the command to look to me for clemency, so that when I cut down the sentence they may have more confidence in me."

Now, the fundamental question then is twofold: First, are you going to work on the theory that a man who is up for trial is to have fair trial, or are you going to work on the theory that the courts are merely a procedural device for fostering an impression of fair trial, but that the real function of the court is to carry out the viewpoint of the commanding general, the commanding officer.

Second, are you going to be content, assuming even that this uniform code would permit of a fair trial, which I doubt, are you going to stop with the theory that a fair trial is all that is required or are you going to go further and say that it is necessary to the welfare of the armed services that their personnel believe that they are getting a fair trial as a help to the maintenance of morale.

It seems to me that, first, you must insure a fair trial, and second, you must maintain a belief in a fair trial if you are to have a fighting army, and a fighting army and the ability to win wars is the thing upon which command has based its argument that it must control the courts.

Now, so far as controlling the courts is concerned, I find a very peculiar conflict which I have not been able to understand and to which I have never been able to obtain an answer. I have been promised it, but it has never been forthcoming.

The War Department itself put in the Elston bill article 37, which prevents any attempt by any officer to influence or to coerce a court or the members of a court, or to admonish or reprimand the members of a court for anything they did in the performance of their duty.

Therefore, it would seem to follow that the War Department and, I take it, the other services feel that when a man is brought up for trial, it is necessary that he receive a fair trial, uninfluenced by command, and yet we have former Secretary of War Patterson and General Eisenhower, whom I certain greatly respect, saying that it is necessary to retain these powers in command because command is responsible for discipline.

Now, to me that is double talk. If command is not to influence the courts, then why must it maintain the power to appoint them? If the

argument were that it must decide which men are available for court-martial duty because it cannot have the chief of operations pulled out of some important work in order to sit on a court, I could see that, but that plan is perfectly consistent with the one to which Mr. Spiegelberg referred, and the amendatory legislation which I worked on with him, by which your command says, "These officers are available for court-martial duty," but the judge advocate at the higher level decides which officers will serve.

So, I can see no justification whatever for the theory and the claim of the military, and by that I refer generically to the military, that it is necessary to maintain the power to appoint the court in order to preserve discipline.

The question of practicability is another argument that has frequently come up. It cannot be done, they say: "It is not practical; in the Navy, why, we have ships at sea; and in the Army we cannot have these men bouncing all around."

Now, the fact is that that just is not true, and I am not saying that because it is a theoretical concept of mine, but because the Army and the Navy have furnished illustrations of doing practically the thing that we are talking about and advocating here in the last war.

There are three specific points I would like to make on that: In the United States, in the Sixth Service Command which consisted of the States which surrounded Chicago as focal point, there was one general court martial. By that I do not mean one court but one center, and that was at headquarters, Sixth Service Command. All trials of service command personnel from that area were brought, with witnesses, to Chicago, to the headquarters, and that is where they were tried. So, it obviously is possible to have fair trials, expediently and without undue loss of time or authority of command at a centralized location by a court which is not appointed by the commanding officer of the unit to which the accused belongs.

Second, in the north African theater they had what they called traveling teams. The traveling teams consisted of a trial judge advocate, a defense counsel, and a law member, and those teams went to these small units and set up their court. The trial judge advocate, when he got there, had the witnesses available for him. He prepared the case, the same as the defense counsel. They set up court and the trial was held with these traveling personnel. So, it is also possible to have even a prosecutor, let alone a defense counsel, who is not appointed from the command in which the accused is being tried.

Third, so far as the Navy is concerned, I think that the Navy will admit that it was the general rule during wartime, which is the time of crisis and the time of greatest difficulty to hold general courts martial not while the ships were at sea, but when the ships had come into port, and once the ships have come into port there certainly is no difficulty about trying the man before a court composed of personnel who are not part of the ship's completement. If you can do it in wartime, you can do it in peacetime, and if you can do it in wartime under their own methods, there is no reason why you cannot do it in wartime under a method which is enacted into legislation, as proposed here.

I would like again to hit at another practical point, and that is the relationship of the independent Judge Advocate General's Corps to fair trials.

Under the Elston bill there is set up an independent Judge Advocate General's Corps, independent in this sense: it is not taken out of the Military Establishment, and I may add it is for the Army only and does not apply to the Navy, and there is a question of whether it applies to the Air Force. The Air Force says it does not.

This Judge Advocate General's Corps is responsible from the Judge Advocates General through the Chiefs of Staff to the Army higher echelons.

But the members of the corps are responsible for the performance of their duties not to the line officer on whose staff they serve, but to the next higher echelon of their own chain of command, and their efficiency ratings, their promotions, their assignments of duty all stem through their own chain of command, which means that the power of the commanding general or the commanding officer over them is greatly lessened.

If there is conflict, they have a perfect right to go directly to their superior officer or directly to Washington, if they care to under the Elston Act, and ask for reassignment; and if the Judge Advocate General's Corps maintains the traditions that is did during the time when I was in the service there will not have to be two requests.

I found that, as a practical matter, when any conflict arose Washington stood back of its men in the field, but now they have direct authority to do so.

Now, what does that mean? I think I might address myself to the chairman in this connection: It is perfectly true that the judge advocate will want to stand on good terms with the commanding general, but that is for the reason that in any sphere of life you like to work on good terms with the person with whom you are working, with your fellow worker, and irrespective of rank, the command and the Judge Advocate General officer, irrespective again of his rank, will be fellow workers because they will have and belong to parallel commands, without the power to impress their will, one on the other.

As long as military justice functions in a division, and I will take Mr. Spiegelberg's example, without interference from the commanding general, there is no reason why a body of officers from their command could not fairly judge facts.

After all, sir, and I address myself to Senator Morse, most of your officers in wartime are civilians in uniform, and although they have had a certain amount of orientation and indoctrination, you cannot wipe out the years of life before them which give them the civilian attitude.

In addition to that, I have sufficient confidence to believe that most officers, whether they come in from civilian life or whether they are part of the Army as a career, have an American sense of general fairness, and unless somebody kicks them and puts pressure on them, they are going to do their best to find the same fair verdict that a civilian jury would.

Now, it is true there will be a certain number of them who will not have a sense of fairness, but that is true in a civilian jury, too, and I do not think that the system by which military officers become the triers of facts is a bad system if they become triers of fact and are at liberty to render their findings and sentence in accordance with their oath, which is according to their conscience.

It is only when you have the imposition of command influence that you get your distorted results.

As to command influence: I would certainly like to second Mr. Spiegelberg's statement that there is absolutely no way of proving an officer guilty of a violation of article 37 unless he is a hopeless idiot. In the first place, you cannot prevent an officer from discussing a case at the dinner table and he has a number of other officers present at his table, and he does not talk about the case of Private Jones, but he talks about the prevalence of a. w. o. l.'s.

"Gentlemen"—or even at a staff meeting—"this is a very serious problem, and unless we find some means to make the men realize that a. w. o. l. is a serious offense it is going to become a more important problem."

Now, you put the members of the court at that table or not at that table, but what happens? The latrine rumor keeps moving down the line. The man who was at the table talked to his friend. I have never seen anything spread faster than what the commanding officers wants in a military unit. It gets down, and it gets down in a matter of hours and not of days. So that the officers appointed to the court, if you have that type of thing going on, realize that the Old Man wants an example made.

I have seen that same thing carried out simply by the device of the commanding general's putting an officer in arrest by a special order, which is perfectly in accordance with his rights, only it is never done unless it is something which is in the commanding general's mind. He would like to emphasize the fact that he considers this a very serious offense.

Then, in those circumstances, if his officers become members of the court, and are dependent upon him for their promotions, their efficiency ratings, their leaves, their duties, their entire military career, as they are, what do you expect, especially from career officers? What can they do unless they are very unusual people and are willing to buck the Old Man, and take a "very satisfactory" instead of the "excellent" rating, and "very satisfactory" is a way of saying he should not be cashiered, but he is a louse.

Now, if you have a fair-minded commanding general, your judge advocate at Army level, will appoint the members of the court from the panel which has been selected by the commanding general of the division.

Should this type of influence appear there is no fear that the judge advocate will not know about it. Everybody in the command, as Mr. Spiegelberg said, will know about this.

Now, to that extent you must rely upon the integrity and decency of your judge advocate.

If he is a person who prefers to kowtow to the commanding general because he has rank, and it is nice to have him smile upon him, and take him out in the car and go out to the reviewing stand, now nothing is going to happen. But any system of military justice, or civilian justice, depends, in the final analysis upon personnel.

On the other hand, having relieved the judge advocate of the pressure from command by setting him in an independent corps, there is a reasonable prospect that if such interference occurs at the division level he will use the right which is specifically given to him in the present act, and will communicate with his superior, with the result

that the next half dozen courts will be courts that are selected from panels from the Ninety-ninth Division instead of the One Hundredth Division, and they will come down to the Hundredth Division and try the men of the Hundredth Division. It will not be necessary to do that very often before the commanding general would realize that his own standing in the Army was being jeopardized by the necessity felt at higher echelons of taking over the appointment of the courts from him. I doubt very much whether it would be necessary to appoint courts from a higher or a different echelon or command after the first, perhaps, year or year and a half of the service.

So, it has two functions: It is practicable and I cite to you gentlemen that if you do not do it, you can have all the trimmings you want in the court-martial system, and you will not have a fair trial and have a belief in the system.

I would like to address myself for just one minute to two other phases. One, I will make very brief, and that is what is referred to in article 15 as the commanding officer's nonjudicial punishment. In the Army today, by regulation, although the commanding officer has the right to inflict limited punishment upon an officer in time of war or upon an enlisted man, that officer or enlisted man has the right to demand trial by court martial.

In this bill that right is not preserved. Now, I do not want to mislead you. The right was not given to the officer or the enlisted man in the Articles of War. It was by Army regulation that it has been given.

Such a right does not exist in the Navy, and does not exist in the Navy today, and I do think that a right to demand trial by court martial is a right that should not be taken away from either enlisted personnel or officer personnel of any of the services.

Furthermore, I do not think that if that right is given to the enlisted man, and this applies only to the enlisted man for technical reasons which I will not go into here, but if that right is taken away, furthermore, I think he should not be tried by a summary court, which is simply one officer appointed by the very officer who has the power to inflict punishment and in which no record is kept but should be given only to a special court martial where you have three officers who, we hope, will have some independence at any rate, and where a record, although only an abstract of the record, is kept.

The second point I would like to make is as to the Judicial Council. An outcry has arisen in certain quarters—I do not think it is very extensive: "What you are doing is to put the civilians in command of the Army." Now, that is nonsense. In the first place, as I started out by saying, discipline is a matter which is accomplished at the level of the lower units. Certainly, it is not higher than the division level. The Judicial Council, or as it has been named now in H. R. 4080, the Court of Military Appeals, does not function at that level. It sits as a sort of supreme reviewing court.

So what it does will not reach the lower units until months and months afterward, and then if any word of it reaches them it will be a very extraordinary thing, so we do not have any interference with discipline.

On the other hand, from a morale viewpoint, as well as from a viewpoint of abstract justice, that Court of Military Appeals is tremendously important because now you will be able to say if this

legislation is enacted, "You have sitting as the ultimate reviewing authority at the highest level in any important case a court of three civilian judges who have the same standing as the United States court of appeals judges, and if you do not think you are going to get a fair trial or a fair deal from the Army courts you have that appellate court to look to," and I think that would be a very important morale factor as well as being a very helpful body for getting into the serious cases; in the civilian, or perhaps I should say, the constitutional sense of justice.

In addition to that, as Mr. Spiegelberg pointed out, it does have the function of reviewing military justice procedure and law yearly; and there, again, in cooperation and in coordination with the judge advocates of the various services, I think it may be a very great influence for good. But I cannot conceive of a system of military justice which warrants the word "justice" unless you do have a separation of command control from the courts.

I want to thank you, gentleman, for your patience.

Senator KEFAUVER. Senator Morse.

Senator MORSE. Mr. Farmer, does the New York University Law Review Quarterly article set forth all of the recommendations that you make for changes in court-martial procedure, in the court-martial system?

Mr. FARMER. It does not, for this reason: The article sets forth the essential ones. I have mentioned one today, and that is with respect to article 15, which is not in the Law Review article.

I would say that, for the most part, the other recommendations which I have made have now been incorporated in 4080 as distinguished from 2498, so that the other little things that were incorporated, I frankly did not feel to be of such importance that they require any emphasis.

Senator MORSE. So, then, if I understand your position, your recommendations in the Law Review Quarterly, your recommendations today, plus your joining in the recommendations of the American Bar Association constitute your recommendations to this committee as to what we need to do to have a good court-martial system?

Mr. FARMER. That is right, sir.

Senator MORSE. Is there any basis at all for the recommendation of some, any basis in your opinion at all, for the recommendation of some, that court martial of privates in the Army should include on the military court at least some privates?

Mr. FARMER. That is now in the Elston Act; it is part of our law, that upon the request of an accused enlisted—you say privates as distinguished from enlisted men, or were you distinguishing enlisted men from privates?

Senator MORSE. Let us just say, first, enlisted men.

Mr. FARMER. That is what I was addressing myself to. It is now provided that upon the request of an accused enlisted man, the enlisted men to at least one-third of the total number of the court shall be appointed. I do not think it means a thing. In fact, if I were an enlisted man, I certainly would not want enlisted men sitting on the court, and for two reasons: In the first place, so long as you maintain your present set-up, who will the enlisted men be who will be appointed to the court? The mess sergeants around headquarters, the 15-year men, the men who are more anxious than any officer and

more under the thumb of the commanding officer than any officer will be, the ones who will be appointed to sit on the court.

I do not know whether you saw that New Yorker cartoon a few weeks ago, Senator. The court was sitting arranged behind the bench, and on the left of the court was the hardest-boiled sergeant you ever saw in your life, and the president of the court was addressing the accused and saying, "Private So-and-So, you now have the signal right of being tried by a jury upon which enlisted—a court upon which enlisted men are sitting." And that is what is happening.

Now, even if you adopt the system that Mr. Spiegelberg and I advocate, after all, you must give to the commanding officer the right to designate which personnel from his command shall sit on courts, because the court martial is only one, and, comparatively speaking when you are waging war, a minor part of the functions of an Army.

You cannot deprive him of men whom he finds essential. Therefore, even under our system, it would still be the commanding officer who would be appointing the enlisted men, from whom the judge advocate would select members of the court.

I really do not think there would be any benefit, and I think there is much harm in appointing enlisted men for that reason and also because it has been the experience at—I do not remember the exact name of it, but out in Kentucky——

Senator MORSE. Camp Knox.

Mr. FARMER. Camp Knox, where it was always found necessary where the trainees act as members of the court, there they have full courts of trainees, to reduce the sentences. There is no one who is so anxious to show his desire to maintain discipline as an enlisted man.

I am afraid that is psychologically true, although it may not be idealistic.

Senator MORSE. Well, there is a problem there, but let me play with that procedure for a moment. Let us eliminate by way of assumption the usual argument that it is not practical, and it cannot be done, and let us assume that we would have to do it. How could we best set it up if we had to do it?

Now, I agree with you that, just as in our civilian jury selection system, we have a basis for exemption or we have a basis for dismissal, if drawn. Why is it entirely out of the question when you come to select your court, which, as you point out in your testimony, functions in the capacity of a jury, too—it is a kind of a mixed procedure here. Why can we not use a system of lot, so that the commanding officer cannot pick the top sergeant? The top sergeant, if he gets on, will get on only because he is in the ballot box, in the jury box, and his name is drawn.

Why can we not have findings of fact by a cross-section of your personnel, whether the man is an enlisted man or a general?

We have bankers and ditchdiggers on our juries, and I do not know why we cannot have generals and privates on our court martial when a determination of facts in the application of the law——

Mr. FARMER. Well, now, there are a number of answers I might make to that. The first one I would like to make is this: It is one man's experience, but at least it is mine, and that is all I can speak from——

Senator MORSE. Well, that is more than I have in this particular field, so that is why I am trying to learn.

Mr. FARMER (continuing). That where a command influence is not exercised, your courts were a darned fair bunch of men. They really tried to find out where the truth lay and they tried to be fair about their sentences and, therefore, I do not really feel it is necessary.

Point 2, you have a very practical situation, concededly, among your enlisted men; you have men of excellent educational qualifications, intelligence, aptitude, and conscience. You also have among them men who come—do not have the educational ability, advantages, nor the intellectual qualifications.

The reason why an officer, I think, is a better man is that he must have certain minimum educational qualifications and he must have a certain intelligence quotient.

Now, if you move down to your enlisted men and say only enlisted men who have had this much education and have this much of a grade on their Army general qualification test, you are taking out your key enlisted men from your command. They are the men who are actually the ones on whom your officers and Army most rely in great part, and I think if you were to have that in wartime, that would be a darned bad idea.

Senator MORSE. Of course, that is a pretty good argument for a blue-ribbon jury, but I'm not so sure I like blue-ribbon juries.

Mr. FARMER. If you were sitting as the accused, sir, and it was a question of weighing credibility, would you prefer an intelligent man on your jury with some education, some knowledge of the ways of men, or would you be perfectly willing to have on the jury a man whose intelligent quotient might not be better than that of a 7-year old, and who had not got any further than the fifth grade in grammer school?

Senator MORSE. If you were to ask me what I would want, perhaps, in this civilian court, I would probably just as soon take my chances with, as I would in an equity proceeding, the court itself, but that does not happen to be our American system of civilian justice.

I see no reason—I see some reasons, but I mean I am pressing here for comparison purposes an inquiry as to why we should not carry over to the extent that we can recognize differences, the same procedural system in a military court that we have in a criminal court down here in the District Building.

Mr. FARMER. I think we are, sir.

Now, look at the scrap that came up at the Commie trial, because the Federal court generally selected its panel of jurors among those who appeared at least for the most part, to be a little—to have a little more education and a little more solidity in their backgrounds.

Now, nobody has ever claimed that you do not get fair trials out of that. In fact, Judge Knox directly said that we are doing it because we are tired of having trials in which we have jurors sitting who have no comprehension of business affairs and do not have the ability to comprehend.

I do not think that the jury system, although it is the pillar of our independence and of our justice, must be taken to mean that there be an absolute cross section. I think the jury system might very well be improved in civilian life as in the Army by a selective panel of jurors.

Senator MORSE. I completely agree with that, and I used to so teach in criminal procedure when I was taking up criminal procedure reform, but we certainly would not want to go to the point where we laid down the requirement that only businessmen or only people of certain economic status——

Mr. FARMER. No.

Senator MORSE (continuing). Can serve on our Federal juries, so we have the practice in this country in our Federal juries of having a very good cross section of our citizenry, based upon competency; that is the foundation there ought to be, that we have got on the jury people competent to find the facts. The abstract of that criterion is nevertheless what we ought to try to work for, it seems to me.

Now, let us say, without giving you the examples, let us refer to the many types of cases that you get before a military court martial, where the determining factor is just a question of fact, did he or did he not do it; was he or was he not there; did he or did he not say it. I am far from convinced that from the standpoint of morale you have to have a board of officers find that question of fact.

I am far from convinced that you could not have on it men of lesser rank, along with officers, to find that question of fact. But, as you say, there is some testimony, some evidence in writings, some writings that I have read, that you have to watch out for those people of lower rank not being even more harsh than the people of higher rank. But I recognize that practical problem, and I am trying to get down here to first questions first: Could you have competent findings of fact on a military court martial with men on them other than officers, or with a mixed group?

Mr. FARMER. Well, of course, as I pointed out, sir, the Elston Act does provide for that, but it does not provide as to how you are going to form your panel from which they are drawn.

Now, I would like to direct myself to something which you said, and that is the cross section.

Senator KEFAUVER. Of course, Mr. Farmer, the provision of the Elston Act is carried over in article 25 (c).

Mr. FARMER. In here.

Senator KEFAUVER. To all of the services in here.

Mr. FARMER. That is right, except for one thing. I think it is necessary—I will agree with the amendment here—that in certain situations it may not be possible to have qualified enlisted men sit because of a peculiar situation, and that is taken care of there, but when that happens there must be a certificate attached stating that the enlisted men were not appointed because of such and such circumstances which made them unavailable which, I think, is a fair safeguard.

Senator MORSE. Too, it is based upon selection by the officers.

Mr. FARMER. That is right.

Senator MORSE. Rather than the suggestion that I am asking for discussion of, of drawing from a jury panel.

Mr. FARMER. But so far as your cross section is concerned, that's the distinction in our Army today, and particularly in wartime between officers and enlisted men, is not a distinction for justice purposes, because your officers come from every sphere of life. They have varying degrees of education, except that there are certain minimum standards

of education and intelligence prescribed, and they have just as varying attitudes as any jury that you will ever find in general or State courts.

Senator MORSE. Is it true or false that interviews with large numbers of enlisted men have produced the result that a large number of them, the majority of them, have recommended that enlisted men be on courts martial?

Mr. FARMER. They have, but I think that one reason is a basic dissatisfaction with the way that the courts were acting and not merely because there were officers sitting, and I think it was a failure to analyze why the courts were coming up with the wrong answers, and I think that if you clean up the situation where the commanding officers dictate the answers, so that the men, feeling that they are getting a fair trial, and they have a proper system of review, your morale question will be met.

Senator MORSE. That is all.

Senator KEFAUVER. Mr. Farmer, will you prepare the amendments to article 15——

Mr. FARMER. Yes, sir.

Senator KEFAUVER. Which will reinstate the right of court martial?

Mr. FARMER. I will be glad to do that.

Senator KEFAUVER. We thank you very much for your statement.

Mr. FARMER. It has been a pleasure, and I thank you for your indulgence.

Senator KEFAUVER. Mr. Maas, we will be very glad to hear you now.

## STATEMENT OF MELVIN J. MAAS, PRESIDENT, MARINE CORPS RESERVE OFFICERS ASSOCIATION

Mr. MAAS. Mr. Chairman and Senator Morse, I want to address myself particularly to one phase of this bill.

I am here as national president of the Marine Corps Reserve Officers Association. We have made an analysis of the bill, and by a group of distinguished lawyers in our association, all of whom had had experience as judge advocates during the war.

We are disturbed by——

Senator KEFAUVER. Excuse me, do you have the analysis that the Marine Corps Reserve Officers Association has made of this bill?

Mr. MAAS. I have not it written out, but I was going to take it up in this bill. However, the main points we want to make relate to the application of the military justice code to Reserves, and if you will take into consideration that under this code a court-martial offense is a criticism of the President or any Member of the Cabinet or of the Congress, the governor of a State in which he is serving—that is a court-martial offense. With that in mind the section which applies to the military code and makes a Reserve on inactive-duty training subject to court martial, being recalled to active duty without his consent, and court martial any time within 3 years, is pretty far reaching.

Senator MORSE. Colonel, I am sorry, could you refer me to the page where that is?

Mr. MAAS. I have the original House bill. It is on that bill, page 4. I do not know whether it is the same as the Senate bill, but it is article 2 under definition of persons subject to the code, and it is the third subsection, "The following persons are subject to this code," page 4, line 24.

Senator MORSE. I have the House bill before me.

Mr. MAAS. Well, that, Senator, says that those subject to this code are "Reserve personnel who are voluntarily on inactive-duty training authorized by written orders."

If this is taken literally, that means that the reservist, while attending a voluntary training unit, which he does in civilian clothes, without pay, no Government-furnished facilities, and we conduct these in our offices or our homes or any place where we can find, we do not draw any pay at all—we are in civilian clothes.

Senator KEFAUVER. Now, Mr. Maas, suppose we get the language—were you reading the language as finally written by——

Mr. MAAS. No; in the original bill. We do not think the change——

Senator KEFAUVER. 4080?

Mr. MAAS. No; I was reading it from 2498, which is the same language that is before you.

Senator KEFAUVER. Well, suppose we get it in the record as reported by the House committee.

Mr. MAAS. We have no assurance that is the way you would report it. You have your own bill before you.

Senator KEFAUVER. We would like to have you discuss the House language.

Mr. MAAS. Yes.

Senator KEFAUVER (reading):

> Reserve personnel, while they are on inactive-duty training authorized by written orders which are voluntarily accepted by them, which orders specify that they are subject to this code.

Mr. MAAS. We still do not think that makes very much difference.

Senator KEFAUVER. It is some little difference.

Mr. MAAS. Well, whether it specifies that you are subject to the code or are not, when you accept the order then you have to accept that condition.

Now, gentlemen, if it is for military security, we of the Reserves do not get military secrets. They are very carefully screened from us. I do not hesitate to say that the papers have been disclosing that there are civilians in other departments who learn 10 times as much as we do about military secrets. They do not teach us in the Reserve, certainly not in the voluntary Reserve—matters of high strategy, nor top military secrets, so it cannot be to protect against security.

We just are not in a position to disclose matters that would jeopardize the security of the Nation.

The only conclusion we can come to is that it is to protect somebody against criticism.

Now, to an American the right to criticize public officials is practically a God-given right, and so long as the right of criticism is unfettered, no dictator can exist. It is when you suppress criticism that you have the danger of dictatorship.

Now, if the reserve, merely because he is willing to take his own time in peacetime to train himself for the defense of his country is to lose his rights of citizenship—one of the precious rights is to criticize—if criticism violates the law, if it is libelous or there is a defamation of character, there are civilian laws and civilian courts to deal with that, but to say that merely because we are citizen soldiers

we lose our constitutional rights, and that we are subject to recall and court martial, and for a period of 3 years after such an alleged criticism takes place, will simply destroy your Reserve.

Senator MORSE. Can I talk to you in terms of a hypothetical?

Mr. MAAS. Yes, Senator.

Senator MORSE. Because, unfortunately, that is the way I think. Do I understand you to say, in connection with this hypothetical—here, we will say—well, take yourself, you are under article 2, Reserve personnel. You have accepted these written orders.

Now, am I to understand that while you are under those orders we will say that you speak at a banquet, and you say the Senator so-and-so's position on X issue is so contrary to the best interests of this country that "I hope you people thoroughly defeat him in the next election." Am I to understand from you that that would subject you to discipline under the particular proposal if it passes?

Mr. MAAS. Well, if someone thought that that violated article 85—article 88, rather, any time 3 years after I made that speech, I could be ordered to active duty without any consent of my own, and court-martialed for it.

Now, I might win the court-martial case. The court might decide that was not a violation.

Here is the language to which I am referring, Senator:

> Any officer who uses contemptuous or disrespectful words against the President, Vice President, Congress, Secretary of Defense, or a Secretary of a Department, a governor or a legislature of any State, Territory or other possession of the United States in which he is on duty or present shall be punished as a court martial may direct.

Now, that is part of the code, and the section I read, makes anyone subject to that code——

Senator MORSE. Now, I will add to my hypothetical, so that there are no questions as to your disrespect, I will say, "I think he is subversive, and you ought to defeat him." The next day, after you make the speeech, if I understand your hypothetical, the next day after you make the speech you go about your regular business——

Mr MAAS. That is right.

Senator MORSE. Continuing as a citizen, and, we will say, you run a store or practice law or practice medicine or what not. You would be subject, according to your interpretation, to court martial because you said that that Senator ought to be defeated because he is subversive?

Mr. MAAS. Yes; that is if it is contemptuous or disrespectful. That is for 3 years. By that time I might have forgotten any remarks I made, and certainly not have any witnesses in my own defense.

Senator KEFAUVER. Let me get this straight, Colonel Maas. You are not on inactive-duty training now.

Mr. MAAS. I command, Senator, a volunteer training reserve air wing in the Marines. We meet once a month in civilian clothes, without pay, for 2-hour period. It is an official drill.

Senator KEFAUVER. Does it not only refer to the time that you are actually meeting?

Mr. MAAS. Yes; but at such meetings—now, frequently, as the Senator pointed out, sometimes we hold these meetings at a dinner. We do not count the part of our eating as part of the drill, but as soon

as we are finished, say at 7:30, we push back the chairs and we call the meeting to order. We meet for a 2-hour period as a minimum period.

Senator KEFAUVER. I know, but Senator Morse's question, I think, suggested that if you should go on out tonight and——

Mr. MAAS. I misunderstood that part of it.

Senator KEFAUVER. And make some derogatory statement about Senator Morse or me, in line with—which might be within the provisions of what are the sections you referred to, article——

Mr. MAAS. Article 88.

Senator KEFAUVER. Article 88, you would not be subject to being called?

Mr. MAAS. Not if I made it at a banquet in which I was in an entirely civilian capacity, but to subject Reserves on inactive-duty training—now, we recognize the distinction of a reserve who is in uniform being paid for training duty as one thing, but on these volunteer training units, to make us subject to accounting for everything that we might say even in a conversation is just quite going to destroy the morale of the Reserves. Anyhow, it is a question of stopping criticism, not a question of protecting military security.

Senator KEFAUVER. At your meetings, are you on written orders?

Mr. MAAS. It may or may not be.

Senator KEFAUVER. Well, when would you be and when would you not be?

Mr. MAAS. We all get orders assigning us to these units. We do not get specific written orders by the Commandant of the Marine Corps, but every notice of a meeting is a written notice, and every member receives a notice of the meeting, which is in writing. We do not know how far the interpretation goes, whether it is under written orders or not, but if this were passed they could very easily write us orders for every one of the meetings. We do not think it is necessary, in the first place, nor acceptable to citizen soldiers that they should be subjected to a code or at least that part of the code that prohibits them from criticism of public officials.

We certainly do not think that the public officials should be so sensitive that they are unwilling to be criticized.

As you gentlemen know, I spent 18 years in the House of Representatives, and if anybody got any more criticism than I did, I do not know who it was, but I certainly was not thin-skinned about it.

Senator MORSE. I thoroughly agree with you, not only about Reserves, but we all should look over this thing very carefully; that people who are not Reserves, if you decide that because you served your country in uniform you are muzzled, as far as criticism is concerned, that is carrying it to a dangerous degree. I think criticism from people in uniform is a good thing. They are in a good position to criticize.

Mr. MAAS. You certainly ought not to put the retired military personnel under this control. Once they are retired, they get their retirement because they earned it. They have earned it; that was a deferred payment during those years of active service. He has then got to become a civilian, and if you want to make certain that you will prevent dictatorship, you must unmuzzle them; they know what is going on, and they are not militarists. If you give them their voice, they will be the greatest force in preventing any tendency toward militarism in this country, and there is such a tendency.

Senator MORSE. I think it is a two-edged sword. I think it is a two-edged thing. My point is that merely because we are in Congress, for example, we have not any right to think that we can kick the military personnel around, and they are helpless to reply and say what they think of our point of view; and I think they ought to be allowed to say it critically.

I think we have gone too far in this idea that people in the military service lose their rights of critical speech.

Mr. MAAS. I thoroughly agree with you, Senator, and I think that has got as much to do with discouraging the best type of Americans from either going into or remaining in the military service as the inadequate retirement benefits. It is this constant regimentation and denying them all the rights that to Americans are God-given.

Senator MORSE. I can see where a high military officer ought to know that he should not have the right to issue a policy statement which is full of criticism of individuals, I recognize that. But that is quite a different thing from informal statements, off-the-cuff conversations, Navy Club, Army Club members that too frequently, it seems to me, get them into discipline, when they never meant them as official statements at all.

I am not going to burden this record with the recent notorious example in the Navy of that effect, but I think it was frightening.

Mr. MAAS. Well, it frightens us, Senator, this constant trend toward constant encroachment in the field of censorship of criticism, under the guise of protecting military security.

We feel what abuse there is of criticism is a small price to pay for criticism, and the benefit that comes from intelligent and constructive criticism.

Now, if you shut off the Reserves from commenting on military matters and criticism of military policies, which is now attempted to be controlled by the rule of propriety, you then close to yourselves and to the people whom you represent the last informed source of criticism of our military matters.

Senator MORSE. What do you think this means, Colonel, on page 5, points 4 and 5:

> Retired personnel of a Regular component of the armed forces who are entitled to receive pay.
>
> 5. Retired personnel of a Reserve component who are receiving hospital benefits from an armed force.

How would that, according to your understanding of it, work?

Mr. MAAS. Well, that bars all retired personnel, including those reserves receiving retirement under this retirement act or reserves being hospitalized. Whether it would include veterans who are no longer in the service or not, I do not know.

It may be intended to include them, too.

Senator KEFAUVER. Well, Colonel Maas, you think that of first importance is to strike out subsection 4 of article 2.

Mr. MAAS. We see no need for it at all, or at least to redefine it in such a manner as to make reserves subject only to strict military violations and not bar them from making critical remarks about public officials. It will do incalculable harm to the Reserves, and your whole reserve program if you leave that sort of threat.

Senator KEFAUVER. For the benefit of the committee, would you reword or suggest amendments to subsection 3, 4, 5, and 6? They are the ones that you refer to.

Mr. MAAS. Yes; we want to recommand—now, I will prepare for you an amendment which would remove retired personnel from military disciplinary control at all. Sometimes a question, when I say that, is raised about Benny Meyers. Well, I point out that Benny Meyers has never been tried by a court martial; he was tried in the civil courts, so that retired personnel who violate laws will find there are plenty of civil laws and plenty of civil courts to try them. The whole thing is to hold a club over a retired officer, threatening his retired pay which he has all previously earned, for criticism.

Retired officers are subject now to submit in advance any public statement they make, any article they want to write, or any speech they want to make.

Senator MORSE. Let me get this straight: Suppose you, as a retired officer, wanted to run for Congress now. I can well imagine—let us make it Colonel X—I can make it——

Mr. MAAS. God forbid that I ever run again.

Senator MORSE. I can imagine that Colonel X would probably have a lot of criticism to make of a lot of people in that campaign. Technically, could he be punished?

Mr. MAAS. Technically, he could. His choice would be to resign from the Reserve or resign from the retired list. I do not think they would actually attempt to discipline him if he was a candidate for public office, but there is nothing in here that says that that exempts him.

Senator KEFAUVER. Colonel Maas, it seems to me that section 6 is inconsistent with section 3. In other words, is there not a greater restriction placed over the members of the fleet reserve, Fleet Marine Corps Reserve, than are under the Regular-Reserve personnel under subsection 3?

Mr. MAAS. Well, yes, I think it is, but they are, of course, considered—they are likely retired officers. The fleet reserve in effect are retired. They are held on a retainer list with the same pay as retired pay in most cases until they have had their 30 years. They are not subject to any greater restrictions than any other retired personnel though.

Senator KEFAUVER. We appreciate receiving your suggestions.

Mr. MAAS. I do not want to take more of your time, Mr. Chairman, but we have gone through the bill in some detail, and I would like to submit a brief with respect to our other comments.

This is the one about which we are most disturbed, and I want to assure you we are seriously disturbed about it.

Senator KEAFUVER. I have looked over your statement in the House committee, and you do have other worth-while suggestions to make, and we would be glad to have a brief from you.

Mr. MAAS. Thank you very much. I will file a brief on the other points, but I know you will take into serious consideration my criticism, which represents my organization as well as my own point of view on attempting to do anything that would even remotely appear to be or could later become used as a gag on civilian soldiers.

Senator MORSE. Could you give us in addition to that a brief covering your views as to the recommendations of the American Bar Association?

Mr. MAAS. Yes, Senator. We agree with a great deal of their points. However, we feel in this Supreme Court set-up that they should have the right to review facts which they do not have now. We think that

a better system would be to have this final judicial council have authority to review facts and make questions of strict law available for appeal to Federal courts where it involves just the law.

Now, all this council can do is to rule on the law, not on the facts of the case, so that it is not the same kind of an appeal most men think of. When they think they are ultimately going to get a review by civilians, they can review only the law, not the facts involved, not the record of a case.

Senator KEFAUVER. Well, Colonel Maas, do they have a right to set aside a verdict or a sentence if they feel it is not supported by substantial evidence? That is, the substantial evidence rule is supposed to apply to their consideration.

Mr. MAAS. The amount of evidence, I do not think they can go on to the merits of the evidence.

Senator KEFAUVER. We are very grateful to you.

Mr. MAAS. Thank you very much.

Senator KEFAUVER. Gentlemen, there are three others who were supposed to testify this morning, and I am sorry that we have not heard them. We have a quorum call, and I think we must go.

Mr. Clorety, what is your situation?

Mr. CLORETY. I could return tomorrow, Senator.

Senator KEFAUVER. Can you return this afternoon?

Colonel Oliver, can you return this afternoon?

Mr. OLIVER. I am available, if it please the committee.

Senator KEFAUVER. Colonel McElwee?

Colonel MCELWEE. I will be available at your convenience.

Senator KEFAUVER. Suppose we reconvene at 2:15 this afternoon, and we will try to get along and hear everybody we were supposed to have heard this morning, this afternoon, and also Colonel Weiner and Colonel King. They will be here this afternoon.

I am suggesting 2:15 instead of 2, because I have a short meeting at 2 that I will have to attend.

At this point in the record, I want to include a lengthy statement submitted by Senator McCarran, as chairman of the Committee on the Judiciary, which is in the form of a letter to Senator Tydings, which I think will be valuable for the consideration of the committee.

(The document referred to is as follows:)

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
*April 30, 1949.*

HON. MILLARD E. TYDINGS,
*United States Senate, Washington, D. C.*

MY DEAR SENATOR TYDINGS: As you know, I have long been interested in the problems presented by the application of our courts-martial system to both the personnel of the armed services and the civilians who happen to be subject to the same jurisdiction. I have always done my utmost to protect the civil rights, so far as it is constitutionally possible, of persons of both classes who must undergo trial by military tribunal. Accordingly, I have made an intensive study of S. 857, which purports to unify and revise the Articles of War and the Articles for the Government of the Navy so as to establish a Uniform Code of Military Justice. I am, therefore, submitting for your consideration the following comments relating to the provisions of the proposed legislation.

I regret that they are necessarily lengthy, but the bill is of such great import that it warrants the most detailed consideration possible. In this connection I respectfully request that this letter be made a part of the record on this bill so that all persons interested may have an opportunity to evaluate its contents.

In considering this proposed Uniform Code of Military Justice preliminary consideration should be given to the following points:

1. The Committee on a Uniform Code of Military Justice, which formulated this proposed code, was composed of Prof. Edmund M. Morgan, Jr., acting as chairman, and four members of the Military Establishment. The staff which assisted this committee consisted of 15 members of the Military Establishment. Thus the work was weighted by 19 from the Military Establishment to 1 professor from civilian life.

2. This proposed code will govern in peacetime as well as wartime a large segment of the population of the United States consisting mostly of civilians and persons drafted from civilian life.

3. This segment of the population which will be subject to administrative and military tribunals which Congress is asked to set up or continue completely outside the judicial system as provided in article III of the Constitution.

"In appraising the system of military justice, the emphasis must be on its actual operation rather than on the relevant statutory provisions standing alone. Experience has shown that legislation in this field may not always be taken at face value, since the pressures of military life tend to thwart congressional intention and to deprive statutory language of the meaning it would have in other contexts" (Wallstein, The Revision of the Army Court-Martial System, Columbia Law Review 48: 219, March 1948).

COMMENT ON S. 857

Section 1 of S. 857, Eighty-first Congress, proposes a Uniform Code of Military Justice applicable to all of the armed forces, including the Coast Guard whether operating as part of the Navy or as an independent organization under the Treasury Department. The definitions are set out in article 1.

Article 2 lists the persons who are subject to the code. Included are persons "awaiting discharge after the expiration of their terms of enlistment." The commentary of the Committee on a Uniform Code of Military Justice found on page 5 of Uniform Code of Military Justice—Text, References, and Commentary * * * merely states that paragraph 1 in which this provision appears "is an adaptation of A. W. 2 (a)." However, a perusal of that section fails to disclose any such authority to hold a man subject to the Articles of War after the expiration of an enlistment. If this is to remain in the code it should be qualified to make certain that the code applies only to personnel held after the expiration of their enlistments pursuant to the legal order of a court-martial as provided in paragraph (7).

Paragraph (11) subjects to the code "all persons serving with, employed by, accompanying, or under the supervision of the armed forces without the continental limits of the United States * * *" and certain territories. Paragraph (12) goes a step further, subjecting "all persons within an area leased by the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States * * *" and certain territories. The commentary of the Committee on a Uniform Code of Military Justice states:

"Paragraphs (11) and (12) are adapted from title 34 United States Code, section 1201, but are applicable in time of peace as well as war. Paragraph (11) is somewhat broader in scope than A. W. 2 (d) in that the code is made applicable to persons employed by or under the supervision of the armed forces as well as those serving with or accompanying the same and the territorial limitations during peacetime have been reduced to include territories where a civil court system is not readily available."

Considering the number of persons who served in the armed forces during World War II and who will serve in the future, these provisions will place a very large portion of the population—both civilian and armed forces personnel—under an almost exclusive jurisdiction of military tribunals. As indicated in the commentary, military law has not heretofore been thus extended, especially in application to peacetime conditions.

Article 3 states that Reserve personnel who are charged with having committed an offense while in a status in which they were subject to this code may be retained on duty or may be placed on an active-duty status for disciplinary action without their consent. This provision appears to stem from section 301 of the act of June 25, 1938 (52 Stat. 1180; U. S. C. 34: 855) relating to the Naval Reserve. The enactment of this provision will foreclose appeals to the civil courts in circumstances such as those involved in *Hironimus* v. *Durant* (1948) (168 F. 2d 288) where a WAC captain on terminal leave was returned to active

duty to stand trial. The general rule, heretofore applicable with regard to the Army, has been stated in *Mosher* v. *Hunter* (1944) (143 F. 2d 745, 746) thus:

"It is generally true, as contended, that courts-martial jurisdiction is coexistent and coterminous with military service and ceases upon discharge or other separation from such service (sec. 10, ch. 4, Manual of Courts Martial United States Army, 1928), and it does not extend to offenses committed against military law by those who are subsequently discharged or otherwise separated from such military service, unless courts-martial jurisdiction first attached before separation from the service, in which event jurisdiction continues until fully exhausted (*Carter* v. *McClaughry*, 183 U. S. 365, 383; 22 S. Ct. 181; 46 L. Ed. 236; *Ex parte Wilson*, D. C., 33 F. 2d 214; cf. *Ex parte Clark*, D. C., 271 F. 533). Furthermore, all persons under sentence adjudged by a court martial are subject to military law (Second article of war, subsec. (e) 10 U. S. C. A. 1473 (e)), and are therefore within the jurisdiction of courts martial for offenses committed against military law. This is true although his military service ceased before jurisdiction attached and before trial and sentence (*Carter* v. *McClaughry*, supra; *Kahn* v. *Anderson*, 255 U. S. 1; 41 S. Ct. 224; 65 L. Ed. 469; and *Mosher* v. *Hudspeth*, supra)."

With regard to subdivisions (b) and (c) of article 3, the commentary states that (b) provides that a person who obtains a fraudulent discharge is not subject to this code during the period between the discharge and later apprehension for trial of the issue. Subdivision (c) is prompted by *Ex parte Drainer* (1946) (65 F. Supp. 410), which held that a discharge from the naval service barred prosecution of a person for desertion from the Marine Corps at a period prior to his enlistment in the Navy (p. 8). In that case the court said (p. 410):

"It is the general rule that a person is amenable to the military jurisdiction only during the period of his service. *United States* v. *McDonald* (2 Cir., 265 F. 695; Naval Courts and Boards, sec. 334, at p. 92; Winthrop, Military Law and Precedence [sic] second ed. (1920) at p. 89). And once honorably discharged, such honorable discharge is a 'formal final judgement passed by the Government upon the entire military record' of the person (*United States* v. *Kelly*, 15 Wall. 34 * * *).

Thus article 3 proposes to authorize the retention of complete jurisdiction over personnel of the armed forces for indefinite periods.

Article 4 relates to a dismissed officer's right to a trial by court martial and should be read in conjunction with section 10. If enacted, paragraph (a) should at least be amended by inserting after President the following words: "under the provisions of section 10 of this Act", so that the first part of the sentence will read:

"(a) When an officer, dismissed by order of the President under the provisions of section 10 of this Act. * * *" etc.

The following commentary on this article (p. 10) is illuminative:

"This article should be read in conjunction with the provision being reenacted in section 10 of this act. The right to trial will apply only in the case of a summary dismissal by order of the President in time of war. (Sec. 10 covers the provisions now found in A. W. 118 and A. G. N., art. 36.)

"If the President fails to convene a court martial where there has been an application for trial, or if the court martial convened does not adjudge dismissal or death as a sentence, the procedure followed will be the same as that prescribed article 75 (d) where a previously executed sentence of dismissal is not sustained on a new trial. This changes the present statutory provisions set out in the references. The change is made because of the doubt, expressed by Winthrop and other commentators, as to the constitutionality of the present provision declaring that an order of dismissal, lawfully issued by the President, shall be void under certain circumstances. Under the proposed procedure it will be possible to achieve the same result—that of restoring the officer.

"No time limit has been set on when an application for trial must be submitted. The present statutory provision has been construed to require that the application be made within a reasonable time, which will vary according to circumstances. (See Winthrop, Military Law and Precedents, 1920 ed., p. 64; Digest of Opinions, Judge Advocate General of the Army, 1912–40, sec. 227.)"

Article 5 states that this proposed "code shall be applicable in all places." Thus universal application is proposed. The commentary (p. 11) states:

"This article reenacts the present Army provision. It is not in conflict with the provisions in article 2 (11) and 2 (12) of this code, which make certain persons subject to the code only when they are outside the United States and also outside certain areas. The code is applicable in all places as to other persons subject to it. Previous restrictive provisions on this subject in the Articles for

the Government of the Navy have given rise to jurisdictional problems which this language will correct. (See Keeffe report, p. 262 ff.)"

Article 6 paragraph (a) subjects the assignment of legal officers to the approval of the Judge Advocate General. In this connection we note that sections 246 and 247 of the act of June 24, 1948 (Public Law 759, 80th Cong.) created the Judge Advocate General's Corps and provided for the permanent appointment of officers to serve in that corps. Thus the law specialists, insofar as the Army is concerned, would appear to be already under the control of that Judge Advocate General. This suggests that the status of the officers of other judge advocates be examined in the light of sections 246 and 247.

Paragraph (c) of article 6 states:

"(c) No person who has acted as a member, law officer, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate or legal officer to any reviewing authority upon the same case."

The commentary states (p. 12) that this paragraph is based on A. W. 11 (see sec. 208 of Public Law 759, 80th Cong.) and is designed to secure review by an impartial staff judge advocate or legal officer.

While this paragraph appears to correct some of the abuses under the present system (see *Henry* v. *Hodges* (1948), 76 F. S. 968), it could go further toward assuring a thorough and impartial investigation by providing that the investigating officer should not act in any other capacity during the trial of a person he has investigated.

Part II—Apprehension and Restraint, contains articles 7 to 14. This part appears to be a codification of present practices with some enlargement. Any person, authorized under regulations governing the armed forces to apprehend persons, may do so, under the provisions of this proposed code, upon reasonable belief that an offense has been committed and that the person apprehended committeed the offense.

Part III—Non-Judicial Punishment, greatly broadens the authority heretofore exercised in the Army by a commanding officer under A. W. 104. Without commenting on the Navy phase of this proposal, we give hereunder A. W. 104 and proposed article 15. The enlargement of the power of a commanding officer to mete out "nonjudicial punishment" is apparent.

"ART. 15. Commanding officer's non-judicial punishment.

"(a) Under such regulations as the President may prescribe, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

"(1) upon officers and warrant officers of his command—

"(A) withholding of privileges for a period not to exceed two consecutive weeks; or

"(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

"(C) if imposed by an officer exercising general court-martial jurisdiction, forfeiture of one-half of his pay per month for a period not exceeding three months;

"(2) upon other military personnel of his command—

"(A) withholding of privileges for a period not to exceed two consecutive weeks; or

"(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

"(C) extra duties for a period not to exceed two consecutive weeks, and not to exceed two hours per day, holidays included; or

"(D) reduction to next inferior grade if the grade from which demoted was established by the command or an equivalent or lower command; or

"(E) confinement for a period not to exceed seven consecutive days; or

"(F) confinement on bread and water or diminished rations for a period not to exceed five consecutive days; or[1]

"(G) if imposed by an officer exercising special court-martial jurisdiction, forefeiture of one-half of his pay for a period not exceeding one month.

[1] It appears that this provision should go the way of flogging or at least be confined in its application to offenses committed while at sea.

"(b) The Secretary of a department may, by regulation, place limitations on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers authorized to exercise such powers, and the applicability of this article to an accused who demands trial by court-martial.

"(c) A officer in charge may, for minor offenses, impose on enlisted persons assigned to the unit of which he is in charge, such of the punishments authorized to be imposed by commanding officers as the Secretary of the Department may by regulation specifically prescribe.

"(d) A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The officer who imposes the punishment, his successor in command, and superior authority shall have power to suspend, set aside, or remit any part or amount of the punishment and to restore all rights, privileges, and property affected.

"(e) The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty." [2]

Part IV—Courts-Martial Jurisdiction: Proposed articles 16–21 establish three kinds of courts-martial—general, special, and summary—and the jurisdiction of each.

At the outset it should be remembered that courts martial are the creatures of statutes, and, as a body or tribunal, they must be convened and constituted in conformity with provisions of the statute or they are without jurisdiction (see *Flackman* v. *Hunter* (1948), 75 F. S. 871, 876; *Anthony* v. *Hunter* (1947), 71 F. S. 823, 828; and *Runkle* v. *U. S.* (1887), 122 U. S. 543, 555).

Particular attention is invited to proposed article 18, which reads:

"Subject to article 17, general courts-martial shall have jurisdiction to try persons subject to this code for any offense made punishable by this code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code. General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."

The commentary on proposed article 18 states that it is derived from A. W. 12 which reads:

"General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That general courts-martial shall have power to adjudge any punishment authorized by law or the custom of the service including a bad-conduct discharge." [3]

Article 21 states that the provisions of the proposed code conferring jurisdiction upon courts martial shall not be construed as depriving military commissions or other military tribunals of concurrent jurisdiction. This provision stems from A. W. 15. The Supreme Court has held that by this provision Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases (*Ex parte Quirin* (1942), 317 U. S. 1, 28). Furthermore, a military commission may be appointed for this purpose by any field commander, or by any commander competent to appoint a general court-martial (*In re Yamashita* (1946), 327 U. S. 1, 10).

Articles 22, 23, and 24 list the persons who may convene courts martial.

Article 25 states who may serve on courts martial.

"(a) Any officer on active duty with the armed forces shall be competent to serve on all courts-martial for the trial of any person who may lawfully

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[2] This would appear to give a vindictive commanding officer two bites at the apple since a "minor" offense is nowhere defined.

[3] There seems to be no reason why the offense (infra) punished under this code should not be defined in the same language as the Federal Criminal Code and the limitations of punishments be identical.

Consideration should also be given to trial in civilian courts, upon information, for offenses committed in United States which offenses are cognizable under Federal civil statutes.

be brought before such courts for trial." Under paragraph (b) warrant officers on active duty are competent to serve on general and special courts martial of any person other than an officer. Enlisted men, exigencies permitting and providing they are not of the same unit, shall constitute at least one-third of the membership of a general or special court martial if the accused makes a written request prior to the convening of the court for the inclusion of enlisted men. As enacted in section 203 of the Selective Service Act of 1948 (Public Law 759, 80th Con.), from whence this provision stems, the wording is:

"Enlisted persons in the active military service of the United States or in the active military service of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general and special courts martial for the trial of enlisted persons when requested in writing by the accused at any time prior to the convening of the court. When so requested, no enlisted person shall, without his consent, be tried by a court the membership of which does not include enlisted persons to the number of at least one third of the total membership of the court."

Section 212 of Public Law 759, Eightieth Congress, states that: "No enlisted person may sit as a member of a court martial for the trial of another enlisted person who is assigned to the same company or corresponding military unit." Thus while the basic right to have enlisted men sit on a court martial trying an enlisted man is retained, a new contingency depriving an enlisted man of this right is proposed—viz, "unless competent enlisted persons cannot be obtained on account of physical conditions or military exigencies." In such a case the convening authority must state the reasons in writing. As indicated by Wallstein earlier, the test of these provisions must be their actual operation and this operation will be under tribunals having neither continuity nor tenure.

Paragraph (d) (2) of proposed article 25 states that: "No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case." Apparently the addition of this limitation to wording in the last paragraph of A. W. 4 is necessary even though the requirement of a "thorough and impartial investigation" received careful attention and was enacted into positive law in 1920. This matter will be discussed later in connection with proposed article 32. Returning to the limitation, its need is illustrated in *Henry* v. *Hodges* (1948) (76 F. Supp. 968) where Judge Ryan stated (p. 974): "The functions of the investigating officer, as contemplated by article of war 70, are those ordinarily performed both by the civil prosecuting officer and the grand jury. These functions are described in the Soldier and the Law, by McCoomsey and Edwards (at p. 155) as being 'similar in many respects to a grand jury investigation in which the grand jury determines whether a man is to be tried.'. Surely it would be a travesty of justice to have the complainant-accuser sit on a grand jury, testify before it as a witness in support of the complaint, and then vote for and return a true bill. The duties performed by the investigating officer are highly important to the accused. He must be strictly impartial, since he represents both the accused and the prosecution. It is his obligation to gather and record facts which would be admissible evidence in the court-martial trial and to do this he must investigate. It is upon his recommendation that the commanding officer relies in determining whether there is to be a trial at all, and, if so, for what offense and by what type of court. Can it be fairly said that one who assumes the duties of an investigator is not disqualified by reason of the fact that he has previously expressed in a written report his opinion as to the guilt of the accused, when such report has been made the basis of the very charge he is investigating? Can it be argued that one who is to give testimony on behalf of the prosecution (and who subsequently does so, as to the alleged admissions of the accused) has an open mind on the matter, so that his efforts will be directed along investigational channels which might lead as well to the acquittal of the accused as to his condemnation? Can we reasonably hope that such investigator will pursue interrogation and examination of proposed witnesses with the same zealous and unbiased effort as one who has had no previous contact with the case? The answer to these questions is obvious. It is manifestly impossible for him to conduct the thorough and impartial investigation contemplated and directed by act of Congress."[4]

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[4] This paragraph (4) (2) should have added "Violation of this paragraph shall void the proceedings."

Proposed article 26 stems from the second paragraph of A. W. 8, which provides for a "law member" of a general court martial. In his place is a "law officer" who is no longer a voting member of the court and, except for putting the "findings in proper form" as required in proposed article 39, he does not consult with members of the court except in the presence of the accused, trial counsel, and defense counsel.[5]

Under proposed article 27 the commentary states (p. 41): "The trial judge advocate is renamed the trial counsel, and the right of the accused to have a person requested by him act as defense counsel is subject to the availability of that person. (See art. 38.)"

"Paragraph (1) of subdivision (b) incorporates the first proviso of A. W. 11, but the requirement that counsel be qualified as set forth therein is no longer subject to the exception allowed where such qualified persons are not available * * *." In view of the mandatory language of proposed article 27, we are unable to understand the qualifying language in the commentary. We assume that there is no intention to permit the recurrence of a situation such as is found in *Beets* v. *Hunter* (1948) (75 F. Supp. 825) where a soldier was represented, contrary to his wishes, in court-martial proceedings by an officer who was wholly incompetent to represent him and who did so only on military orders. "The court has no difficulty in finding that the court which tried this man was saturated with tyranny; the compliance with the articles of war and with military justice was an empty and farcial compliance only, and the court so finds from the facts and so holds as a matter of law" (p. 826).

Proposed article 28, derived from A. W. 115, shifts the power to appoint reporters and interpreters from the president of the court to the convening authority "since the latter will have control of the available personnel" (commentary, p. 42). Article 29 establishes the procedure whereby general and special courts martial may continue with a case when the required membership has been reduced by reason of physical disability, challenge, or by order of the convening authority for good cause. Recorded testimony must be read to new members prior to continuing the trial.

Part VI—*Pretrial Procedure:* The proposed articles forming part VI are taken largely from A. W. 46, as enacted in the Selective Service Act of 1948 (Public Law 759, 80th Cong., sec. 222), A. W. 24 (U. S. C. 10: 1945), and A. G. N. 42 (c) (U. S. C. 34: 1200, art. 42 (c)).

The commentaries on two proposed articles—31 and 32—merit careful consideration. Article 31 states:

"ART. 31. Compulsory self-incrimination prohibited.

"(a) No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

"(b) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement at all regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.[6]

"(c) No person subject to this code shall compel any person to make a statement or produce evidence before or for use before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

"(d) No statement obtained from any person in violation of this article or by an unlawful inducement shall be received in evidence against him in a trial by court-martial."

Commentary: "Subdivision (a) extends the privilege against self-incrimination to all persons under all circumstances. Under present Army and Navy provisions only persons who are witnesses are specifically granted the privilege. Subdivision (b) broadens the comparable provision in A. W. 24 to pretect not only persons who are accused of an offense but also those who are suspected of one. Subdivision (c) is similar to A. W. 24 in that the privilege against self-degradation is granted to witnesses before a military tribunal and persons who make deposi-

[5] This article cripples the conduct of the court's deliberations in that the accused loses the important safeguard of having an informed lawyer present during the deliberations and voting of the court in closed session as is the present case in the Army and Air Force.

[6] That this can be overdone was brought to my attention in an Army case where the investigating officer, in testimony attempting to show that a confession was in fact voluntary, stated that he "warned the accused no less than 20 times."

tions for use before a military tribunal. It is made clear that this privilege cannot be invoked where the evidence is material to the issue—where it might be crucial in the determination of the guilt or innocence of an accused. Subdivision (d) makes statements or evidence obtained in violation of the first three subdivisions inadmissible only against the person from whom they were obtained. This conforms with the theory that the privilege against self-incrimination and self-degradation is a personal one.

"The intentional violation of any of the provisions of this article constitutes an offense punishable under article 98.

"It is unnecessary to provide in this article that the failure of an accused to testify does not create a presumption against him. (See title 18, U. S. C., sec. 3481.)"

A question may arise concerning the application of the provision of the fifth amendment stating that "* * * nor shall [any person] be compelled in any criminal case to be a witness against himself * * *" to personnel of the armed forces. *Ex parte Benton* (1945) (63 F. Supp. 808) and *In re Wrublewski* (1947) (71 F. Supp. 143, affd. 166 F. 2d 243) indicate that the constitutional guaranties of the fifth and sixth amendments may not be invoked in cases arising in the land or naval forces of the United States. (See also *Ex parte Quirin* (1942) 317 U. S. 1, 43; *Ex parte Milligan* (1866), 4 Wall. 2, 123; and *U. S. ex. rel. Innes* v. *Crystal* (1943), 131 F. 2d 576.)

Article 32 requires a thorough and impartial investigation; requires that the accused be advised of charges against him; that he be permitted to provide civilian counsel of his own or select military counsel if reasonably available. "At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf * * * and the investigating officer shall examine available witnesses requested by the accused." The charges shall be accompanied by a statement of the substance of the testimony. The article concludes:

"(d) The requirements of this article shall be binding on all persons administering this code, but failure to follow them in any case shall not constitute jurisdictional error." [7]

Taking this last element first, cases to date have held that such failure was a jurisdictional matter (see *Waite* v. *Overlade* (1948), 164 F. 2d 722; *Reilly* v. *Pescon* (1946), 156 F. 2d 632; cert. den. 329 U. S. 790; and *Hicks* v. *Hiatt* (1946), 64 F. Supp. 238.) Thus there is an obvious attempt to foreclose any possible review by Federal courts on this point. This is indicated by the commentary (p. 49):

"Subdivision (d) is added to prevent this article from being construed as jurisdictional in a habeas corpus proceeding. Failure to conduct an investigation required by this article would be grounds for reversal of a reviewing authority under the code and an intentional failure to do so would be an offense under article 98."

While failure to conduct the investigation would be an offense under article 98, it is difficult to see how this will benefit the accused who must depend upon a nebulous right of review by a whole maze of reviewing authorities and tribunals.

This requirement of "a thorough and impartial investigation" has been a delicate point of controversy for a long period. The requirement first appears in article 70 of the Articles of War which were enacted as chapter II of the Army Reorganization Act of June 4, 1920 (41 Stat. 759, 787, 802). This chapter revised an earlier revision of the Articles of War which had been enacted as section 3 of the Army Appropriation Act of August 29, 1916 (39 Stat. 619, 650, 661). As enacted in 1916, article 70 did not contain the provision requiring "a thorough and impartial investigation."

Returning to the act of June 4, 1920, the law carries the bill number H. R. 12775, Sixty-sixth Congress. This bill, as introduced and passed by the House, was merely a reorganization proposal and did not deal with the Articles of War. On the Senate side another organization bill, S. 3792, Sixty-sixth Congress, was receiving legislative consideration. In the meantime S. 64, Sixty-sixth Congress, entitled "A bill to establish military justice" and proposing an extensive overhauling of the Articles of War, had been the subject of prolonged hearings (1,395 pages) and had been reported. (See Congressional Record 59, pt. 6, p.

[7] The paragraph (d) should be amended to read "* * * and failure to follow them in any case shall constitute jurisdictional error."

5712.) While the bill, as introduced, did not have the requirement of "a thorough and impartial investigation," the reported version did contain the wording later enacted in article 70. The report on this bill appears not to have been printed.

During the consideration of S. 3792, this reported version of S. 64 was accepted on the floor as an amendment. (See Congressional Record 59, pt. 6, p. 5836.)

In the meantime H. R. 12775 had passed the House and had been reported in the Senate (Congressional Record 59, pt. 6, p. 5883). Switching to that bill, the Senate struck out all after the enacting clause (p. 5895) and inserted the amended language of S. 3792 which now contained the amended articles of war, and as amended, the Senate then passed H. R. 12775 (p. 5898) and this provision was agreed to in conference. The hearings and debate on this legislation are illuminative.

Returning to the application of this requirement, *Hicks* v. *Hiatt* (1946) (64 F. Supp. 238) has held that failure to employ required investigative technique may be a denial of due process. There Circuit Judge Biggs states: "The circuit court of appeals for this circuit in *United States* v. *Hiatt* (3 Cir., 141 F. 2d 664, 666), held that the basic guaranty of fairness afforded by the due-process clause of the fifth amendment applies to a defendant in criminal proceedings in a Federal military court as well as in a Federal civil court and that an '* * * individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the Nation's armed forces and has taken the oath to support that Constitution with his life, if need be.' The court went on to state: 'This is not to say that members of the military forces are entitled to the procedure guaranteed by the Constitution to defendants in the civil courts. As to them due process of law means the application of the procedure of the military law. Many of the procedural safeguards which have always been observed for the benefit of defendants in the civil courts are not granted by the military law. In this respect the military law provides its own distinctive procedure to which the members of the armed forces must submit. But the due-process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way. We conclude that it is open for a civil court in a habeas corpus proceeding * * * and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of due process of law and, if it so finds, to declare that the relator has been deprived of his liberty in violation of the fifth amendment and to discharge him from custody'" (p. 248). (See also *Henry* v. *Hodges* (1949 76 F. Supp. 968.)

This is, we believe, consonant with the idea that to those in the military or naval service of the United States, the military law is due process (*Reaves* v. *Ainsworth* (1911) 219 U. S. 296; *U. S.* v. *Weeks* (1914) 232 U. S. 383). To this might be added the logical conclusion that it is due process only when complied with.

Article 33 requires that the charges against a person held for a general court martial, together with the investigation and allied papers, be fowarded by the commanding officer to the officer exercising general court-martial jurisdiction within 8 days after arrest, if practicable.

Under article 34 the staff judge advocate or legal officer is required to review the charge and the evidence, prior to referring the charge to a general court martial, to see that such charge alleges an offense under the code and is warranted by the evidence indicated in the report of the investigation. The 1948 amendment to AW 47 (U. S. C. 10:1518), from whence this proposed article stems, required also a finding "that a thorough and impartial investigation thereof has been made. * * *" This has been deleted. Perhaps it was felt that proposed article 32 covered the situation.

Article 35 requires the service of charges upon the accused and limits the time in which he can be brought to trial before a general or special court martial in time of peace.

Part VII, consisting of articles 36 to 54, inclusive, establishes the trial procedure. Article 36 authorizes the President to prescribe rules of procedure including rules of evidence which shall be reported to Congress. Article 37 seeks to curtail the influence of commanding officers and convening authorities over courts martial. The commentary states that this will not preclude "fair comment" by the reviewing authority (p. 54).[8]

[8] (Art. 37.) The mere prohibition of influence by "command" is not sufficient. This article should be moved over to "Offenses" and violation thereof punished as a "court-martial may direct."

Article 38 states that the trial counsel, in a general or special court martial, shall prosecute in the name of the United States; that the accused shall have the right of counsel; that defense counsel may file briefs and objections for inclusion in the record.

Deliberation and voting by general or special courts martial, under article 39, shall be private but the law officer and the reporter may be used to put the findings in proper form after the vote. "The law officer is not a 'member' of the court and is not to be present during its deliberations and voting" (commentary, p. 57).

Article 40 permits continuances while article 41 permits challenging of members for cause. The accused and trial counsel are each given one peremptory challenge. Article 42 relates to oaths while article 43 establishes the limitations on actions. Subdivision (f) of article 43 lifts section 3287 out of the recently enacted title 18. The reason for including this section is somewhat obscure. The commentary (p. 62) merely states that subdivision (f) incorporates the provision in title 18, section 3287, "which otherwise might not be applicable to court-martial cases." This is puzzling in view of the numerous provisions in title 18 relating to the armed forces which received no notice in the proposed code.

Article 44, captioned "Former jeopardy," reads:

"No person shall, without his consent, be tried a second time for the same offense: but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed." (The problem of double jeopardy was partially covered in the discussion of proposed art. 31.)

The constitutional provision, the application of which is in doubt, reads: "Amendment (V). * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *." *Turner's Case* (1676) (16 Charles II) first laid down this rule (see 33 A. B. A. J. 745). However, it has been held that the findings of a military court of inquiry acquitting a person of all blame is not a complete bar to a prosecution in the civil courts (*U. S.* v. *Clark* (1887) 31 F. 710, 715; *U. S.* v. *Cashiel* (1863) 25 Fed. Cas. No. 14, 744). Conversely *U. S.* v. *Bayer* (1946) (156 F. 2d 964 (reversed on other grounds 331 U. S. 532, rehearing denied, 332 U. S. 785)), and *Ex parte Benton* (1945) (63 F. Supp. 808) indicates that the principle of double jeopardy applies between military tribunals and Federal courts. (See also *In re Wrublewski* (1947) 71 F. Supp. 143, affirmed 166 F. 2d 243; *U. S. ex rel. Pasela* v. *Fenno* (1947) 76 F. Supp. 203, affd. 167 F. 2d 593; *Wade* v. *Hunter* (1947) 72 F. Supp. 755.) However, it is not clear that this rests on constitutional principles rather than upon A. W. 40 as enacted in the act of June 4, 1920, or Revised Statutes 1342, article 102, or similar provisions. The matter could be clarified by extending the protection of the provision of the fifth amendment rather than granting protection by means of different language in a statutory enactment.

Irregular pleading or silence shall be entered as a plea of not guilty. A plea of guilty will not be received in a capital case (art. 45).

Article 46 seeks to afford the accused an equal opportunity to obtain witnesses and other evidence.

Duly subpenaed persons who neglect or refuse to appear before a military tribunal, commission, or officer designated to take a deposition are "deemed guilty of an offense against the United States" triable in a United States district court and punishable by maximum penalties of $500 fine and, or imprisonment not to exceed 6 months. In view of other jurisdictional grants relating to activities of civilians, it appears strange that military tribunals should not seek to enforce their own process. (See art. 47.) They have power to punish for contempts. See article 48, derived from A. W. 32 and A. G. N. 42 (a).

Article 49 relates to depositions; 50 to admissibility of records of courts of inquiry; 51 and 52 to voting and rulings. Subdivision (b) of article 51 reads:

"(b) The law officer of a general court-martial and the president of a special court-martial shall rule upon interlocutory questions, other than challenge, arising during the proceedings. Any such ruling made by the law officer of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, shall be final and shall constitute the ruling of the court; but the law officer may change any such ruling at any time during the trial. Unless such ruling be final, if any member objects thereto, the court shall be cleared and closed and the question decided by a vote as provided in article 52, viva voce, beginning with the junior in rank."

Before voting the law officer of a general court martial and the president of a special court martial shall, in the presence of the accused and counsel, instruct

the court as to the elements of the crime and charge the court that: The accused is presumed innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt; doubt must be resolved in favor of the accused; doubts as to degree of guilt must be resolved in favor of the lower degree; the burden of proof is on the Government.

Article 53 requires the court martial to announce its findings and sentence to the party as soon as determined. However, *Altmayer* v. *Sanford* (1945) (148 F. 2d 161, 162) indicates that a failure to do so does not violate any fundamental right of the accused.

Article 54 relates to the records of trials and the authentication thereof.

Part VIII—Sentences, contains articles 55 to 58, relating to cruel and unusual punishments (on the basis, apparently, that the eighth amendment is inapplicable); to maximum limits; to the effective date of sentences; and to execution of confinement. Attention is invited to the commentaries on these articles.[9]

Part IX—Review of Courts-Martial, should be the focal point for considering the bill for it superimposes on the courts-martial system a review maze which probably will be as indecisive witih regard to the rights of the accused as it attempts to be final with regard to possible review by the civil courts.

This labyrinth commences with proposed article 59, which states first that a finding or sentence of a court martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the rights of the accused. *Hicks* v. *Hiatt* (1946) 64 F. Supp. 238 not only states that it is the duty of the trial judge advocate to see that the accused is dealt with fairly, but that when there are prejudicial errors, the failure of the reviewing authority to order a new trial is an abuse of legal discretion (p. 248). It is difficult to see how an enlarged labyrinth with a sealed outlet could afford an accused person such as Hicks any assurance of justice. The article does permit (subdiv. (b)) the reviewing authority to affirm a lesser included offense.

The first review after the court-martial is the convening authority or his successor or any officer exercising general court-martial jurisdiction (art. 60). The commentary states that this particular reviewing powers vests in the office, not in the convening authority (p. 85). This authority is required by article 61 to refer the record to his staff judge advocate or legal officer for a written opinion if a general court-martial is involved. Even if there is an acquittal of all charges, an opinion limited to questions of jurisdiction is still required. The purpose of such an opinion is obscure.

Article 62 brings forth a new proposal. If a case before a court martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action. Thus the accused may find this passageway in the labyrinth taking him right back to where he started. Subdivision (b) permits nonprejudicial errors or omissions in the record to be corrected by the court when the record is returned by the convening authority for that purpose. The record may not be returned, however, for reconsideration of a finding of not guilty or to increase the severity of the sentence unless a mandatory sentence is prescribed for the offense. Note in this connection proposed article 37 relating to unlawfully influencing the action of a court-martial (See also *Hurse* v. *Caffey* (1945) 59 F. Supp. 363 as illustrative of problems which arise in correcting a verdict.)

The convening authority may order a rehearing or dismiss the charges if he disapproves the findings and sentence but he cannot order a rehearing where there is lack of evidence in the record to support the findings. A new court is required for a rehearing and while the accused cannot be retried on charges of which he was found not guilty, he may be found guilty of an offense not considered upon the merits in the original proceedings. This provision raises the question, How is the accused to know what he is being tried for if such a finding can be made by the new court?

Under article 64 the convening authority approves only such findings and sentence as he finds correct in law and fact and determines should be approved. Then, under article 65, the convening authority, after taking final action in a general court-martial case, forwards the entire record to the appropriate Judge Advocate General. Where the sentence includes a bad-conduct discharge, the

[9] Art. 58 should not be enacted without careful consultation with the Attorney General and Director of Prisons. The most serious considerations should be given to the question of whether or not a discharge should be executed before transfer to a Federal institution so that the parole facilities of the Federal Parole Board may operate on a prisoner's behalf.

record shall be forwarded to the officer exercising general court-martial jurisdiction to be reviewed or directly to the appropriate Judge Advocate General to be reviewed by a board of review. All other special and summary court-martial records shall be reviewed by a judge advocate or law specialist.

This board of review is provided in article 66 which authorizes the Judge Advocate General to constitute one or more of such boards which shall review "the record in every case of trial by a court-martial in which the sentence, as approved, affects a general or a flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for more than one year." This review is automatic (commentary, p. 94). The board acts only with respect to the findings and sentence as approved by the convenient authority. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. Except where the board sets aside the findings for lack of sufficient evidence, it may order a rehearing; otherwise it shall order the charges dismissed. However, the Judge Advocate General may within 10 days refer the case for consideration to the same or another board of review. This reference may not amount to a coercive act on his part but an opportunity to exert pressure is certainly afforded. Unless there is to be some further action by the President, or by the Secretary of the Department, or by the Judicial Council, the Judge Advocate General shall instruct the convening authority to take action in accordance with the decision of the board. If the decision is that there shall be a rehearing, but the convening authority finds this impracticable, he may dismiss the charges. Common sense indicates that such a dismissal would not necessarily clear the record of the accused.

With reference to Article 67. Review by the Judicial Council:

The two questions asked and preliminary answers are as follows:

1. Is this a court? Used in the general sense, this is a "court"; however, it is not a "court" in the strict constitutional sense in that it does not derive its power from article III of the Constitution (*Ex Parte Quirin* (1942) 317 U. S. 1, 39). These military or naval "courts" derive their powers primarily from article I, section 8, clause 14, which states, that "The Congress shall have Power * * * To make Rules for the Government and Regulation of the land and naval Forces." The instrumentalities established are generally referred to as "tribunals" and they form no part of the judicial system of the United States (*Altmayer* v. *Sanford* (1945) 148 F. 2d 161, 162). At least one author has called these courts "instrumentalities of the executive power." Accordingly, while military and naval courts and commissions, whatever their nomenclatural designation, act like courts to a certain extent, they are not courts in the strict sense and meaning established by article III of the Constitution of the United States. Various terms have been used to describe these organizations, the most common being "tribunal," but whatever their designation, they can and have, under certain circumstances, sentenced persons to death and they can and have sentenced men to terms of years in prison at hard labor with the added infamy of a dishonorable discharge.

2. If this is a "court," can it be set up in the Military Establishment?

Subject to the above preliminary answer which indicates that this is a "court" only in the geenral sense of the word, rather than in the strict or special constitutional sense, the answer is in the affirmative. In other words the proposed Judicial Council does not belong to the judicial branch of the Government under present law; it belongs to the executive branch of the Government and can be created subject to certain qualifications to be indicated later.

THE CONSTITUTION

"The Constitution itself provides for military government as well as for civil government" (*Ex parte Milligan*, 4 Wall. 2, 137). "* * * there is no law for the government of the citizens, the Armies or the Navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our Army or Navy may go beyond our Territorial limits, neither can go beyond the authority of the President or the legislation of the Congress" (p. 141).

The constitutional (art. I, sec. 8) sources of military law and jurisdiction may be said to be the following: "The Congress shall have Power * * * To define and punish * * * Offences against the Law of Nations (clause 10); To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water (clause 11); To raise and support

Armies * * * (clause 12); To provide and maintain a Navy (clause 13); To make Rules for the Government and Regulation of the land and naval Forces (clause 14); To provide for Calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions (clause 15); To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States * * * (clause 16); * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof (clause 18)."

Article II, section 1, clause 1 states, "The executive Power shall be vested in a President of the United States of America * * *," and section 2, clause 1 states, "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States when called into actual Service of the United States * * * and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone * * * (clause 2) he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States (sec. 3)." (See *Ex parte Quirin*, 317 U. S. 1, 25–26.)

We note also the fifth and sixth amendments relating to trials.

### THE NATURE OF THE JUDICIAL COUNCIL

Article 67 of the proposed Uniform Code of Military Justice (S. 857 and H. R. 2498, 81st Cong.) establishes a Judicial Council of not less than three members who shall receive the pay and allowances of judges of the United States court of appeals ($17,500 salary per year, Public Law 646, 80th Cong., enacting title 28 of the United State Code, sec. 44). We do not wish to infer that salary is the factor which determines whether or not an officer is an "inferior officer." It is not. The test is whether Congress has vested the power of appointment in the President alone, in a court of law, or in the head of a department (See *Collins's Case* (1878) 14 Ct. Cl, 568, 574 and *U. S.* v. *Perkins* (1886) 116 U. S. 483, 485.)

Two qualifications are required. Appointees shall be from civilian life and shall be member of the bar of the Supreme Court of the United States. Under rules of procedure, which it shall prescribe, the Council shall review on the record:

> "(1) all cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;
>
> "(2) all cases reviewed by a board of review which The Judge Advocate General orders forwarded to the Judicial Council for review; and
>
> "(3) all cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Judicial Council has granted a review."

The accused has 30 days to petition for a review and the Council must act upon the petition within 15 days. Review is limited to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Judge Advocate General's board of review. Where the Judge Advocate General orders the case forwarded to the Council "action need be taken only with respect to issues specified in the grant of review. The Judicial Council shall take action only with respect to matters of law."

If the Judicial Council sets aside the findings and sentence, it may order a rehearing, except where the reversal is based on lack of sufficient supporting evidence in the record. Otherwise it shall order that the charges be dismissed.

After acting on a case, the Judicial Council may direct the Judge Advocate General to return the record to the board of review for further review in accordance with its decision. Otherwise, unless there is to be further action by the President or the Secretary of the Department, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the Council has ordered a rehearing but the convening authority find a rehearing impracticable, he may dismiss the charges.

You will note that while this Judicial Council has the appearance of an appellate tribunal, its findings are subject to executive or administrative action of the President or the Secretary of the department. Thus the proposed tribunal is in the final analysis nothing more than an agency of the executive department.

We believe the following excerpts from Winthrop, Military Laws and Precedents, second edition, 1896, volume I, pages 53–57 (certain citations omitted) characterize this proposed Judicial Council:

"Courts martial of the United States, although their legal sanction is no less than that of the Federal courts, being equally with these authorized by the Constitution, are, unlike these, not a portion of the judiciary of the United States, and are thus not included among the 'inferior' courts which Congress 'may from time to time ordain and establish.' In the leading case on this subject, the Supreme Court, referring to the provisions of the Constitution authorizing Congress to provide for the government of the Army, excepting military offenses from the civil jurisdiction, and making the President Commander in Chief, observes as follows: 'These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power to do so is given without any connection between it and the third article of the Constitution defining the judicial power of the United States: indeed that the two powers are entirely independent of each other' (*Dynes* v. *Hoover* (1858), 20 How. 79).

"Not belonging to the judicial branch of the Government, it follows the courts martial must pertain to the executive department; and they are in fact simply instrumentalities of the Executive power, provided by Congress for the President as Commander in Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.

"Thus indeed, strictly, a court martial is not a court in the full sense of the term, or as the same is understood in the civil phraseology. It has no common-law powers whatever, but only such powers as are vested in it by express statute, or may be derived from military usage. None of the statutes governing the jurisdiction or procedure of the 'courts of the United States' have an application to it; nor is it embraced in the provisions of the sixth amendment to the Constitution. It is indeed a creature of orders, and except insofar as an independent discretion may be given it by statute, it is as much subject to the orders of a competent superior as is any military body or person.

"A temporary summary tribunal—not a court of record: As a purely executive agency designed for military uses, called into existence by a military order and by a similar order dissolved when its purpose is accomplished (*Mills* v. *Martin*, 19 Johns., 33; *Brooks* v. *Adams*, 11 Pick., 442; *Brooks* v. *Daniels*, 22 Pick., 501; *In the Matter of Wright*, 34 How. Pr., 211; 3 Greenleif on Evidence, sec. 470), the court martial, as compared with the civil tribunals, is transient in its duration and summary in its action. ('The discipline necessary to the efficiency of the Army and Navy required other and swifter modes of trial than are furnished by the common-law courts' (*Ex parte Milligan*, 4 Wall. 123). In *Coleman* v. *Tennessee* (97 U. S., 513) the Court refers to the 'swift and summary justice of a military court.') It is not, in a legal sense, a 'court of record' (*Chambers* v. *Jennings*, 7 Mod., 125; *Ex parte Watkins*, 3 Peters 209; *Wilson* v. *John*, 2 Binn., 215) and, unlike the superior courts of record, has no fixed place of session, no permanent office or clerk, no seal, no inherent authority to punish for contempt, no power to issue a writ or judicial mandate, and its judgment is simply a recommendation, not operative till approved by a revisory commander. It thus belongs to the class of minor courts of special and limited jurisdiction and scope, whose competency cannot be stretched by implication, in favor of whole acts no intendment can be made where their legality does not clearly appear, and which cannot transcend their authority without rendering their members trespassers and amenable to civil action (*Runkle* v. *U. S.*, 122 U. S., 556; 19 Op. Atty. Gen. 503).

"Not subject to judicial revision: Further, the court martial being no part of the judiciary of the Nation, and no statute having placed it in legal relations therewith, its proceedings are not subject to be directly reviewed by any Federal court, either by certiorari, writ of error, or otherwise, nor are its judgments or sentences subject to be appealed from to such tribunal. It is not only the highest but the only court by which a case of a military offense can be heard and determined; and a civil or criminal court of the United States has no more appellate jurisdiction over offenses tried by a court martial—no more authority to entertain a rehearing of a case tried by it, or to affirm or set aside its finding or sentence as such—than has a court of a foreign nation. In *Dynes* v. *Hoover*, above cited, this principle is well illustrated by the Court in the declaration that a duly confirmed sentence of a court martial 'is altogether beyond the juris-

diction or inquiry of any civil tribunal whatever,' and further that with the legal sentences of competent courts martial 'civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise'—it is added—'the civil courts would virtually administer the rules and articles of war irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.' This ruling has been abundantly affirmed and illustrated in later cases. ('The Judiciary Act of 1789 gave the Federal judiciary no such control, and none has been given since,' *Woolley's case*, Am. S. R., M. A., v. IV, p. 853; and see *Porret's case*, *Perry's Oriental cases*, 419; *Ex parte Vallandigham*, 1 Wallace, 243; *Ex parte Milligan*, 4 Do., 123; *In re Grimley*, 137 U. S., 147; *Ex parte Reed*, 100 U. S., 13, 23; *In re White*, 17 Fed., 724–5; *In re Davison*, 21 Fed., 618; *In re Zimmerman*, 30 Fed., 176; *In re Spencer*, 40 Fed., 149; *Swaim* v. *U. S.*, 28 Ct. Cl. 173; *In re Esmond*, 5 Mackey, 64; *Moore* v. *Houston*, 3 S. & R., 197; *State* v. *Davis*, 1 South., 311; *Ex parte Dunbar*, 14 Mass., 393; *Tyler* v. *Pomeroy*, 8 Allen, 484; *State* v. *Stevens*, 2 McCord, 38; *Ex parte Bright*, 1 Utah, 148, 153; Whiting War Powers, 278; Cooley, Prins. Const. Law, 113; 12 Opins. At. Gen., 332; Maltby, 151; also *Wales* v. *Whitney* and *Smith* v. *Whitney*, 116 U. S., 168.)

"In the recent case of *Wales* v. *Whitney* (116 U. S. 564) a proceeding instituted against the Secretary of the Navy for the discharge on habeas corpus of an officer of the Navy, the Supreme Court of the United States, in holding that no Federal tribunal 'has an appellate jurisdiction over the naval court martial nor over offenses which such a court has power to try,' adds that no such tribunal 'is authorized to interfere with' a court martial 'in the performance of its duty by way of a writ of prohibition or any order of that nature.'

"This ruling was presently affirmed in the case of *Smith* v. *Whitney* (116 U. S. 168), where a petition for a writ of prohibition to the Secretary of the Navy and to a naval general court martial, to prohibit such court from trying a naval officer, was specifically refused by the same court. More recently the same writ has been refused in an Army case by a United States circuit court (*U. S.* v. *Maney*, 61 F. 140). In a still more recent instance (*Johnson* v. *Sayre* (April 1895), 158 U. S. 109) the Supreme Court, in denying relief to a naval court martial, declares, generally, 'The court martial having jurisdiction of the person and offense,' and 'having acted within the scope of its legal powers, its decision and sentence cannot be reviewed or set aside by the civil courts by writ of habeas corpus or otherwise.'"

Returning now to the proposed Judicial Council, you will note that no term or tenure is provided nor is there the requirement that the nominations be submitted to the Senate. Thus, these officers, for whom salaries of $17,500 and allowances are provided, could be considered only as "inferior officers" under article II, section 2, clause 2. They would serve ostensibly at the pleasure of the President. This appears to be a paradoxical proposal in view of the numerous Executive nominations received in the ordinary course of business of the Senate. (See, for example, the Congressional Record (daily), January 27, 1949, pp. 622–658.) However, "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone," and by article 67 Congress is asked to do so.

That this proposed Judicial Council is merely another administrative agency, as indicated earlier, rather than a "military supreme court" is indicated by the commentary of the Committee on a Uniform Code of Military Justice. This commentary reads:

"This article is new, although the concept of a final appellate tribunal is not. Proposed A. G. N. 39 (g) provides for a board of appeals, while A. W. 50 (a) provides for a Judicial Council. Both of these tribunals, however, are within the Department. The Judicial Council provided for in this article is established in the National Military Establishment and is to review cases from all the armed forces. The members are to be highly qualified civilians and the compensation has been set to attract such persons.

"Automatic review before the Judicial Council is provided for all cases which must be approved by the President. (See A. W. 71.) The Judge Advocate General may direct that a case be reviewed by the Council, and an accused may request review and will receive it where the Council finds good cause.

"The time limits specified in subdivision (c) are necessary to eliminate undue delay in the execution of sentences.

"The Judicial Council takes action only with respect to matters of law. In this it differs from the final appellate tribunals now set up in or proposed for the departments. It may act only with respect to the findings and sentence as

approved by the convening authority. If the Board of Review has set aside a finding as against the weight of the evidence this decision cannot be reconsidered by the Council. If, on the other hand, the Board has set a case aside because of the improper introduction of evidence or because of other prejudicial error, the Judicial Council may reverse if it finds there has been no such error.

"The Council shall affirm the findings and the sentence if it determines that, with respect to the matters which it considers, there has been no error of law which materially prejudices the substantial rights of the accused. (See art. 59, commentary.) It may affirm so much of a finding of guilty as involves a finding of guilty of a lesser included offense. (See art. 59.) The only action which the Council may take with respect to the sentence is to determine whether or not it is within legal limits."

QUALIFICATIONS OF THE MEMBERS OF THE JUDICIAL COUNCIL

Inasmuch as this is not a constitutional court or a part of the Federal judicial system, as indicated earlier (see *Altmayer* v. *Sanford* (1945) 148 Fed. 161), and inasmuch as Congress has this power to vest the appointment of "inferior officers" in the President, it would appear that Congress could constitutionally provide standards of quality for persons designated to fill the positions. In this case there are two. Appointees shall be civilians and they shall have been admitted to practice before the bar of the Supreme Court. Without expressing an opinion as to the legitimacy of these proposed qualifications, we raise, however, the question of whether or not the jurisdiction sought to be conferred ought to be granted to such "inferior" officers.

To cure this defect will necessitate the amendment of the bill so that members will be appointed by the President, by and with the advice and consent of the Senate. By thus hoisting these proposed positions out of the "inferior officer" classification, the next question becomes, Of what force and effect are the two proposed qualifications? Only a partial answer is found in the numerous acts of Congress which have sought to prescribe qualifications. While these statutory stipulations may have some merit in that they serve as a guide to the President and also serve as advance notice of what Congress desires in the way of appointees and what the Senate will approve, it is doubtful if such stipulations have any binding legal significance. Notwithstanding a statute setting forth qualifications for a position—and there are many—if the President nominates, the Senate advises and consents thereto, and the nominee is duly commissioned by the President, it may well be doubted seriously if the status of the officer commissioned could be attacked collaterally in a manner which would effect his ouster from the office.

WHY NOT USE CONSTITUTIONAL COURTS?

As Winthrop indicates, Congress has never made proceedings of courts martial subject to direct review by Federal courts. He might have added that at no time in the history of the Federal judiciary have the lower courts been vested with all the jurisdiction that the Constitution gives them the capacity to receive (Harris, The Judicial Power of the United States, p. 91). Professor Harris points out that during the debate on the bill which became the Judiciary Act of 1789 (1 Stat. 76) two general groups appeared. The Federalists or proconstitutionalists took the view that Congress could not withhold from the courts the jurisdiction specified in article III. The other group, he states, consisted of extreme advocates of States' rights and opponents of the new Constitution who wished either to confine the jurisdiction of the Federal courts within narrow limits or to refuse to provide altogether for courts inferior to the Supreme Court and vest their original jurisdiction in the State courts with only appellate jurisdiction vested in the Supreme Court of the United States. Neither group prevailed in its views, but the compromise reached was an express recognition by legislative construction of the theory of broad congressional power upon which the opponents of a strong Federal judiciary based their contentions (pp. 87–88). The act of 1789 is important for its omissions in certain instances. Congress failed altogether to confer original jurisdiction upon the Federal courts in cases arising under the Constitution, laws, and treaties of the United States. "Except for the brief period between the enactment of the act of 1801 (2 Stat. 89) and its repeal in 1802 (2 Stat. 132), the lower Federal courts had no jurisdiction in that very important group of cases involving a Federal question, and it was not until 1875 that they were vested with judicial power over such cases * * *" (p. 90).

Harris goes further to state that ever since this practical legislative construction of article III by the First Congress, the National Legislature has always proceeded upon the assumption that it had complete discretion to regulate and restrain the jurisdiction, powers, and procedure of the lower Federal courts. Congress has not been alone, he states, in this broad construction of its powers relating to the organization, jurisdiction, and procedure of the lower Federal judiciary. As early as 1799 the Supreme Court concurred in this view (p. 19, citing *Turner* v. *Bank of North America* (1799), 4 Dall. 8).

Thus, while Congress could confer upon lower Federal courts jurisdiction with regard to military and naval offenses, it has not done so.

OTHER PENUMBRAL AREAS

The government of the armed forces is not the only instance in which the Congress can set up a judicial system outside the purview of article III of the Constitution. Under article IV, section 3, clause 2, Congress has "Power to * * * make all needful Rules and Regulations respecting the Territory * * * belonging to the United States." Under this provision, even such rights as trial by jury in criminal cases (*Dowdell* v. *U. S.* (1911), 211 U. S. 325, 332) or presentment or indictment by a grand jury (*Ocampo* v. *U. S.* (1914), 234 U. S. 91) were held to be statutory matters rather than constitutional rights when applied to Territorial possessions.

SUMMATION

The foregoing indicates that the proposed Judicial Council (subject to the infirmities noted) cannot be considered a part of the Federal judicial system established under the authority of article III of the Constitution. It is more properly within the designation of a military tribunal, appellate in character. Generally speaking, military tribunals established under the authority of acts of Congress are constitutional (*Ex parte Reed* (1879), 100 U. S. 13, 21; *Ex parte Quirin* (1942), 317 U. S. 1; and *Application of Yamashita* (1946), 327 U. S. 1), Accordingly it would be possible to establish an appellate tribunal similar to that proposed by articles 67.

Article 68 authorizes the President to direct the establishment of extra boards of review and, in time of emergency, temporary Judicial Councils.

Article 69 authorizes the office of Judge Advocate General to review minor sentences.

Article 70 authorizes the accused to have representation by counsel at appellate reviews as well as the armed services.

Subdivision (a) of article 71, relating to the execution of sentence and the suspension of sentence, raises an intriguing question as to intent. The subdvision reads:

"(a) No court-martial extending to death or involving a general or flag officer shall be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit and may suspend the execution of the sentence or any part of the sentence as approved by him, except a death sentence."

Numerous readings of the last clause stating that the President "* * * may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence" lead to the conclusion that this intends a limitation on the constitutional powers of the President as President and as Commander in Chief. The Constitution not only makes the President Commander in Chief (art. 2, sec. 2, clause 1), the same article grants to him "* * * Power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Now these court-martial cases are to be prosecuted in the name of the United States. See proposed article 38, also A. W. 17. Accordingly, is this not an attempt to control legislatively the pardoning power of the President? (See 20 Op. Atty. Gen. 668; 27 Op. Atty. Gen. 178; *Ex part Garland* (1867) 71 U. S. 333; and Taft, Our Chief Magistrate and His Powers (1925) p. 121.) If something else is intended by the proposed wording, then subdivision (a) should be changed to convey that intention. If it is actually intended to limit the constitutional power of the President, then we invite attention to the statement of Attorney General Jeremiah S. Black in his opinion concerning the memorial of Capt. M. C. Meigs. He stated (9 Op. Atty. Gen. 462, 469):

"* * * Congress is vested with legislative power; the authority of the President is executive. Neither has a right to interfere with the functions of the other.

Every law is to be carried out so far as is consistent with the Constitution, and no further. The sound part of it must be executed, and the vicious portion of it suffered to drop. A legislative act is not to be treated as void merely because it is coupled with an abortive attempt to usurp executive powers. It stands to reason that if a condition, such as this is asserted to be, is void, it can have no effect whatever either upon the subject matter or upon other parts of the law to which it is appended. To say that it is void, and yet of such force that it controls the operation of the statute in which it is found, is a contradiction in terms. As a rule of constitutional interpretation, I think this is nowhere denied, and it agrees with all the analogies of the law. The principle universally applied to public and private grants is that where a grant is made upon an illegal condition the grant is absolute and the condition void. It is as old as the *Yar Books* (2 Henry IV, 9); it is laid down by Coke (Co. Litt., 206); the old reports are full of it (Rolls, Abr., 418; 2 Vent., 109); and no modern authority disputes it. You are therefore entirely justified in treating this condition (if it be a condition) as if the paper on which it is written were blank."

Article 72 establishes the procedure for vacating a suspended sentence.

Article 73 permits a petition for a new trial within 1 year where the sentence extends to death, dismissal, dishonorable or bad-conduct discharge, or to confinement for more than 1 year.

Article 74 permits the Secretary, Under Secretary, or Assistant Secretary of the department, or commanding officer designated by the Secretary to remit and suspend unexecuted portions of sentences other than those approved by the President. An administrative form of discharge is authorized.

Article 75 relates to restoration to duty.

Article 76 seeks to foreclose any possible review by Federal courts. It reads:

"ART. 76. Finality of court-martial judgments.

"The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as required by this code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74."

This provision is substantially the same as A. W. 50 (h) as enacted by the Eightieth Congress (U. S. C. 10:1521). Considering *Schita* v. *Cox* (1944) (139 F. 2d 971), *Henry* v. *Hodges* (1948), and *Innes* v. *Crystal* (1943) (131 F. 2d 576, cert. denied, 319 U. S. 755, rehearing denied 319 U. S. 788), the question of whether or not Congress desires to completely foreclose review by Federal constitutional courts.[10]

Part X—Punitive articles, includes articles 77 to 134 and will not be discussed in this memorandum.

Section 2 of the bill carries the savings clause. Section 3 states that no inference of legislative construction is to be drawn from the position of any article in the bill or by reason of the "catch lines." Section 4 retains jurisdiction for crimes committed prior to the enactment of this bill. Section 5 proposes an effective date 12 months after approval or on July 1, 1950, whichever is the later date.

Section 6 carries technical amendments relating to residual articles of war

Section 7 sets out the authority of naval officers after loss of vessel; the authority of officers of separate arine organizations; the commanders' duties of example and correction; the requirement of divine service and reverent behavior.

Section 8 prescribes the oath of enlistment. Section 9 provides for the removal to Federal district courts of all civil or criminal prosecutions commenced in State courts against personnel of the armed forces on account of activities arising from their status or duties. Section 10 relates to dismissal of officers; sections 11 and 12 carry certain amendments and repeals.

[10] Mention should be made of art. 140, which provides for the delegation and subdelegation by the President of all the authority so carefully granted him in the preceding articles. The constitutional question thus presented concerning the right to delegate a judicial function is too involved to be discussed here if there is to be any limit at all to this brief.

SUMMATION, S. 857

As indicated at the beginning, in appraising the system of military justice, the emphasis must be on its actual operation rather than upon the relevant statutory provision standing alone.

From the viewpoint of judicial proceedings, review in S. 857 is provided ad infinitum, but nowhere is there assurance that this maze of review will be for any purpose other than to fix the record in such a manner or to such an extent that possible intervention by a constitutional court be precluded.

This brief should not be concluded without some special attention to the operation of the Navy court-martial system, especially since most of the articles under consideration seem to have been adopted from either the present Articles for the Government of the Navy or the "proposed" Articles for the Government of the Navy.

The Navy has not been subject to the volume of criticism that has befallen the Army for three reasons. First, it is a smaller and more compact organization; second, because of its smaller size, it could be more efficiently administered from the legal standpoint; and third, its powers to execute, discharge and dismiss offenders were not as broad as those granted the Army.

The present Articles for the Government of the Navy were adopted, in the main, in 1862. There have been no changes of significance since then. Thus, it will be seen the situation is substantially different than that prevailing in the Army where great reforms have been effected as late as 1948.

Unlike the Army, the Navy has not now, and never has had, a corps of lawyers. Until the recent war it possessed a very small group of officers who were regular line officers, but who had been sent to law schools. Most of them had never been admitted to any bar outside of an officer's club. Of all the Judge Advocate Generals of the Navy not more than three have been graduates of law school admitted to practice before the bar of any State of the Union after taking a bar examination. (During the war, most legal billets were filled by Reserve officers called for that purpose or by retired Regulars who had had some legal training in the past.) Hitherto, the practice was to send officers to sea for a tour of duty after their "legal training." After the sea tour was completed, they returned ashore for 3 years' duty in a legal capacity. This rotating system, at the beginning of the present war, forced the creation of the Office of the General Counsel of the Navy Department to provide competent legal assistance in the Navy Department on contract and procurement matters although the Judge Advocate General continued to pretend that he was the "legal adviser" to the Secretary. The civilian office still functions. In effect, it causes two separate (and how distinct) offices to carry on the legal work of the Navy.

Since the war, the Judge Advocate General has accepted some Reserve lawyers in the Regular Navy in the evident hope of regaining some lost ground. However, the Navy continues to consider these lawyers as "specialists" and apparently has no plans for intergrating them properly into their promotion system, holding fast to the belief that a prerequisite to being the Judge Advocate General is the training and experience necessary to command a battleship or a division of destroyers.

The system presently in vogue is not changed in the proposed code. It is earnestly hoped that Congress will amend the bill so as to set up in the Navy a system similar to the Judge Advocate General's Corps in the Army. Such a system at least insures that lawyers will do lawyers' work. It will have the further advantage of enabling lawyers, to some extent, to be promoted on their ability as lawyers. They will work as lawyers at all times during their naval career and thus furnish the Navy with a type of lawyer qualified to cope with those outside the service and with whom they must deal in carrying out their naval duties.

Consideration should be given to having only one Judge Advocate General of all the armed forces, with deputies in the three branches. If we are going to have unification, let's have it.

Finally, the bill should be amended so as to provide that no discharge other than one under honorable conditions shall be given except pursuant to sentence of a court martial.

With kindest personal regards, I am,

Sincerely,

PAT MCCARRAN, *Chairman.*

Senator KEFAUVER. If there is nothing else, the committee will stand in recess until 2:15 this afternoon.

(Whereupon, at 12:15 p. m., a recess was taken until 2:15 p. m. of the same day.)

AFTERNOON SESSION

Present: Senators Kefauver, Morse, and Saltonstall.

Senator KEFAUVER. Colonel McElwee, we will be glad to hear from you. Will you identify yourself and give us the benefit of your experience and information?

Colonel MCELWEE. Yes, sir.

Senator KEFAUVER. Do you have a prepared copy?

Colonel MCELWEE. I have a prepared copy to leave with the committee.

Senator KEFAUVER. It will be printed at this point in the record unless you want to read it?

Colonel MCELWEE. I don't think that is necessary because, in general, I expect to cover more or less the same ground, perhaps in a little more detail.

## STATEMENT OF COL. P. G. McELWEE, JUDGE ADVOCATE GENERAL RESERVE

Colonel MCELWEE. I understood when I was coming up here they wanted me to limit myself to 20 minutes so I shall try to cover the woods instead of the trees.

First, you perhaps want to know who I represent. I don't represent anyone. I just merely come here to give whatever benefit I can from my experience.

I started out in 1940 as the staff judge advocate of the Second Infantry Division. I served in that capacity for approximately 1 year. I was then staff judge advocate of the Fourth Corps for about 9 months having supervision, over that period, of about 10 divisions. I then went to north Africa where I was assistant staff judge advocate of the North African Theater under General Eisenhower in charge of military justice.

Then I was active for a period of 3 months when I was the staff judge advocate of the service of supply of the north African theater. I became the staff judge advocate of the Seventh Army under General Patch prior to the time we went to Italy and into southern France. I served on with the Seventh Army through France into Germany a total of about a year and then for 3 months, I think it was, I was the staff judge advocate of the army of occupation of the western zone.

I then came back to the United States and Secretary Patterson put me on the Clemency Board.

Senator KEFAUVER. So you are well qualified. What do you do now?

Colonel MCELWEE. I might say that I practiced law as a civilian for 19 years before I went into the military service in 1940. Subsequent to coming out of the service around the first of January of 1946, I had been a civilian lawyer. At the present time I am in the Solicitor's Office of the Veterans' Administration.

I think my attitude—at least I evaluate my attitude—toward things is as a civilian rather than a military man. I am past president

of the Reserve Officers Association of Houston, Tex. If I might give my general view of this bill, as it is presented here, I think I could give a homely illustration of the butcher who was presented some good lean meat by one customer and another customer gives him some meat with a lot of fat on it. He sticks it all into the grinder and he grinds it up and it comes out hamburger and in that hamburger there is a lot of lean meat and a lot of fat meat. To my mind, the proposed bill is just a mess of fat meat stuck in with lean meat. I think that epitomizes a a little bit better than I can with a lot of words my view of this thing.

I have had some knowledge of what happened after World War I, the changes of the Army, the progress the Army made, the improvements in the Army after World War II. I gave my two bits worth to the committee when they had the Elston bill, and my feeling is the improvements that were made, makes the Elston bill a very good workable bill. Perhaps there might be some other improvements made in that bill, but on the whole I think it is very good and they are very signal improvements.

On the other hand, it has been a matter of history that there has been practically no improvement in the Navy practice, the Navy procedure dating back to the Civil War. There have been some minor amendments but nothing of practical importance. I think there is an awful lot of thought on the Navy side. My idea of this is it is wrong to come in and drop it into a vat and tear it up and grind it up and let it come out at the other end.

The idea behind it is unification. We have unified this and unified that. As I see this thing they don't actually propose to unify anything. They are going to have something which on its face is a unified bill, but you are going to have a separate set of regulations for the Navy, and a separate set of regulations for the Army, and when you get through the thing will be administered as a separate and distinct set. That being the case, why is it necessary for the unification?

Senator SALTONSTALL. Mr. Chairman, I am interrupting; I will try not to do it more than once.

Isn't the whole theory of this thing, of course, that you have to have a different administration on a ship than you have in a desert, we will say, but it all comes together at the top under the general policies that are enunciated by this civilian appeal board just like the United States Supreme Court? It metes out general policies, whether it be Tennessee, Oregon, or Massachusetts.

Colonel MCELWEE. Senator Saltonstall, that is on the theory that you have this appeal board of civilians. In line with that, which I personally disagree with, I am opposed to that idea of having this group of civilians as the top supreme court. I intend to cover that at a later time—I might as well cover that now, since it is mentioned.

In my experience during the entire past war, I never knew of a single case which was mishandled, or handled improperly, in the board of review, or the Judge Advocate General's Office. In other words, in that high echelon there may have been some case where they made errors that I didn't know about, but if we did, it was a very rare case and I know of none. My experience was that our difficulties arose with the line commanders being unwilling to follow the policies that the Judge Advocate General wanted. In other words, it is along the line of the testimony of the witness this morning. It came from

the line commanders, not from the Judge Advocate General's Office, not from the board of review, not from the appellate board. From past experience I see no reason to take it out of their hands because of what they did.

In other words, the criticisms were things over which they had no power. Now the Elston bill has given them those powers and I think they should have them.

I don't think that many of the miscarriages which occurred of the arbitrary attitude of line commanders, which did occur in the war, will not occur now because the Elston bill has authorized those higher echelons of appeal to remedy the situation. For that reason, I see no necessity for changing.

Now there is an additional reason which I think is a matter of importance. Young men are going into the Army. They are trying to get young lawyers of high caliber to go into the Judge Advocate General's Corps. If you were to get the kind of lawyers that we should have to properly administer this thing, they should have a right some day to look down the line to the chance of getting to be a general. There are only the Judge Advocate General, his assistant, who are authorized to be generals, plus the three members on this Judicial Council. Now, there are three jobs that the young lawyer can go in there and look forward with hopes of some day getting to be a general. In other words, it is a thing of importance to the corps as a matter of the future and if I thought that that Judicial Council——

Senator KEFAUVER. You are talking about the Court of Military Appeals?

Colonel MCELWEE. The Court of Military Appeals, at the present time the Judicial Council, occupies the counterpart of that position and at the present time these young men can look forward some day with the hope of being on that Council. Now, if I thought for one minute that the members of that Council would take the arbitrary positions that I have seen taken by line commanders, I would say, "Have the civilians," but I have never found that in any single instance in my entire experience in the Judge Advocate General's Department.

Senator MORSE. Isn't it also true that arbitrary action is not necessarily limited to military men? That is a human factor and you may get civilians who are arbitrary.

Colonel MCELWEE. You find that in the District of Columbia.

Now, I would like to go back and point out a few things that involved me personally. Those things point up these things that we have been talking about.

When I was the staff judge advocate of the Seventh Army, I made recommendations from time to time in regard to cases which should be tried or should not be tried, and after the cases were tried in regard to the appropriateness of the sentences. I also made recommendations in regard to the personnel on the courts. Now, we had an unfortunate situation there that bore upon me personally: It bears on what the witnesses were testifying about this morning.

I almost invariably differed from the chief of staff. He almost invariably differed from me. In fact, on one or two occasions he tried to get the commanding general to replace me with somebody who would agree with him. The commanding general for some reason saw fit to usually follow my recommendations. I was satisfactory to

the commanding general. Some things were very unpleasant, month after month working under my direct superior who was the chief of staff and I had to submit all of my work to him first.

He would get me over to the office and give me a kind of bawling out that I never received in my life, the way I wouldn't talk to a Negro in my town of Houston, Tex., because of my recommendation. When I wouldn't change them he would get mad and he would take them to the general and sometimes he got the general to follow his advice.

When I would select personnel on the courts who I thought were fair, he wouldn't approve them and he would pick personnel who I thought were definitely unfair.

When I would recommend that a case not be tried he would get mad and want to try it and sometimes he would get the general to try it. Now the result of all this—we were talking this morning about efficiency reports—about these things that they can do to you. I mention these things because they involved me personally, because they bear on that subject. I wouldn't bend to his will.

As a consequence, although I had been in the service for about 4 years with an unbroken line of efficiency ratings of "superior," for the first time that he got an opportunity I got a "very satisfactory" efficiency report.

Now, that means this: In a higher echelon, say an Army or a court, the head staff officers, as a matter of custom, are expected to receive "superior." The reason for that is that if they aren't superior, there are plenty of officers in the command who are entitled to occupy that higher position. Consequently, for the chief of staff to give me a "very satisfactory," not an "excellent," but a "very satisfactory" efficiency report was to say I was far less capable than a corps or a division judge advocate down below us who should be, in his opinion, up there and yet my general disagrees with him, but my chief of staff makes out my efficiency report.

Now, as soon as he left the next chief of staff put me back to "superior," which gives an idea of who was right and who was wrong. That was one experience.

Senator KEFAUVER. Make your experiences relate to the legislation under consideration, will you?

Colonel MCELWEE. I beg your pardon?

Senator KEFAUVER. Relate your experiences to the legislation.

Colonel MCELWEE. The point I have in mind is this business of whether you are under the Judge Advocate General, under his control, and whether it is the Judge Advocate General that appoints up to the office, whether he gives you your efficiency report, or whether that efficiency report or whether your appointment is due to the line commanders with which you serve. That is the phase of it that relates to it.

Now, along the same line, I will mention this as another way they can hold over you——

Senator KEFAUVER. It has been remedied by the Elston bill, hasn't it?

Colonel MCELWEE. The Elston bill, yes; but not by this bill. This bill changes it. This bill puts it back to where it was. This bill puts it back under the head of the line commanders, but even under the Elston bill the line still handles your efficiency report. A couple of

witnesses this morning were in error when they made their statements. The G–1 still handles your efficiency report under the Elston bill. They are doing it day after day. I have personal knowledge of it.

Now, another way they control you, or attempt to, is the Army has control of giving out all of the decorations. My chief of staff would not permit me, the only staff officer in our headquarters, to receive any decoration whatsoever during the entire time they were there. The day before he left he called me over to his office and put a Bronze Star on me. I was quite astounded and went back to talk to G–1 about it. I said, "I guess the old man has repented." He said, "Don't kid yourself. He is leaving tomorrow, and he called me in and said, "You get a Bronze Star to cover the entire period you were with the Seventh Army," so you couldn't get anything else. That was the way they can control you or try to if they don't bend you to their will. I testified not quite in that detail previously but I thought since these matters were mentioned this morning I would go into that. I didn't intend to, in the first place.

I think I covered in my preliminary statement the general effect. In other words, I consider the bill as drawn as a backward step to the Army although a very forward step for the Navy. I think, however, that it can be done. I will say it can be done in a unified bill but not in this bill. In other words, you would have to rework this whole thing over again in order to accomplish that purpose in the unified bill, because there are so many things that I consider improper in this bill. I would just chuck the whole thing out the window and start again if you wanted to have a unified bill. My own idea is the most logical thing to do is bring the Navy up to where they should be and then spend some time, if they want to, working on the unified bill.

I want to mention one of the things now which I consider of vital importance based on experience, and that is the matter of this business of having a law member as a member of the court. I sat as a law member in many cases. I have also talked to the members of the courts, president, other members of court from time to time when I saw a court go haywire on some case, come up with a screwy decision—you couldn't understand it—and I would go and talk to a member of the court afterward not as to how he voted but just why. I found frequently the miscarriages that take place were due to the fact that they did not have some experienced law member on the court. Now, as a law member, I have sat in court, and I have seen this happen. A court would vote "not guilty"—that is, not enough guilty—which would result in acquittal. The president would say, "Open the court and get ready to announce the sentence," not having it occur to him that there is such a thing such as "lesser included offense," so that when you vote "not guilty as charged," the next thing is this lesser included offense involved for which they are guilty. That is the way the thing is handled in closed session. He has overlooked that. I remember two trials where an acquittal would have been announced where I reminded them that they had the lesser included offense and they went back and voted and found him guilty. Now, there would have been a miscarriage of justice if you hadn't had a law member with just a little bit of knowledge of a matter which should have been known by every member of the court, but we had a quickly raised Army here and we had a lot of people and there wasn't a single man there who

was a Regular officer who had had that year of training. They weren't familiar with it and that would have happened.

Now, in other cases, I remember particularly a case of a soldier stealing a jeep. We had trouble with them stealing jeeps. They were trying to stop it and they caught this fellow red-handed. He made an unsworn statement in his own behalf in which he had admitted that he took this car but he had given certain explanations about a girl he had and that others were all doing the same thing and he didn't see why he shouldn't get off. When we got through with that case, the first vote was 6 to 3—it was 5 to 4—which would result in acquittal. It happened that I was president of the court as well as law member at that time and perhaps one without experience wouldn't have done the same thing: I said "Now look, I am not going to accept that vote. I am going to have you vote again and let's talk this case over. This boy admits taking this car and he is not charged with larcency, he is only charged with wrongful taking of it and carrying it away. Is there anybody here who doesn't think he took it? He said himself that he took it." One fellow spoke "They are stealing cars all around here. Why should we hold this fellow when cars are all being stolen?" I said, "I would like to find out how the commanding general could enforce discipline unless we found him guilty. When the fellow admits he took it how could we do other than find him guilty?" I just mentioned a couple of examples. I have seen it happen time and again. I never once ever tried to persuade a member of the court to change his vote from the way he felt or I felt. I never made a statement of law as to what was the law without quoting the manual. I would take the manual—the court manual and open it up and say "The manual says so and so." I would read the manual on the law.

Senator KEFAUVER. Colonel McElwee, that provision is in this bill and you approve of it?

Colonel MCELWEE. In the proposed bill you only have a law officer and he doesn't sit on the court. He doesn't have anything to say. The court closes and leaves him outside and he isn't there to see whether they are going off on a tangent and hold them back on the track. I consider that one of the most important things in this bill.

Senator KEFAUVER. Well, he advises the court.

Colonel MCELWEE. He advises beforehand and gives them instructions and they handle it very similar to a judge in the trial of a civil case.

Senator KEFAUVER. Then you think he should have a right to vote?

Colonel MCELWEE. I think he should be a member and I think it is one of the most important things in military justice. I have never known of a case where there has been a miscarriage of justice through the action of the law member and I have known of many where they have been prevented.

There is a provision in there that specifically says that he shall not vote.

Senator KEFAUVER. Colonel McElwee, I don't want to rush you, but you see we have a lot of witnesses here, so if you will tell us what things you like about this bill and what you don't like about it.

Colonel MCELWEE. I told you the main things I don't like now and I would like to mention one thing since time is short and let me find that—I have article 104 and 106 marked here: The one is in regard to aiding the enemy and the other is in regard to spies.

Now, I am mentioning this from the point of view of showing what I think is a rather careless or perhaps not careless but unenlightened consideration of the way all these things have been prepared in these articles, the punitive articles. I wouldn't try to cover any except these two. If you will notice they are 104 and 106 starts out "Any person who does so and so." The others all start out like 107 "Any person, subject to this code." Now, the difference there in 106 and 104 is "Any person." Now under 104 and 106 any civilian—my wife, my son, anyone you know in the United States—can be tried by a military commission. You will note at the bottom "before any court-martial or military commission for the things mentioned." This first one there is "Anyone aiding the enemy." Anyone who aids or communicates or has intercourse with an enemy—suppose some mother writes to her son who is in a foreign army? She is subject to a trial before a military commission where they can put in any kind of hearsay testimony or do anything they darn please. Now there is a case in the Supreme Court of the United States of Ex Parte Milligan which is in the eighteenth lawyers edition where a very important constitutional matter was announced that was that civilians could not be tried in the United States when the courts were open. That trial was by a military commission, but at that time there wasn't any act of Congress vesting in a military commission the power to try that case.

Section 104 and section 106 vests in that military commission the power to try that case and under the way these articles are drawn, Ex parte Milligan goes out the window and any civilian, if, under 106, goes back to a defense plant at night looking for his eyeglasses or his pocketbook and he is found as they say lurking in the defense plant, he could be tried by a military commission even though the courts of the United States are open and he is a civilian.

Now, I think they are much too broad, the way they have increased the powers and authorities here, are much too broad. I could spend quite a bit of time in the discussion of the different punitive articles of war, but those two there I consider to be very dangerous and they just throw a decision of the United States Supreme Court right out the window.

I have not attempted to go into this thing in detail, but generally speaking, I think it would be advisable to refuse this bill, not to pass this bill, and go to work on correcting the Navy's practice and procedure. If then it is desired to have a unified system, then let's get together with the Judge Advocate General of the Army having his share and the Judge Advocate General of the Navy, which they didn't do in this case, and let them all get together and unify it in an orderly manner, not by some group that doesn't have the advice of the Judge Advocate General of the Army or the Judge Advocate General of the Navy or the Judge Advocate General of the Air Force.

Senator KEFAUVER. Any questions?

Senator SALTONSTALL. No questions.

Senator MORSE. Do you accept any of the recommendations of the American Bar Association?

Colonel MCELWEE. Yes; many of them, in fact I go along with nearly all of them. I haven't read them. I don't know how they stand on this Judicial Council. Personally I feel it wise to have that in the military more than anyone else. Most everybody has been

against it. It makes a difference to my view and I still think it should be in military hands.

Senator MORSE. That is all.

Senator KEFAUVER. Thank you, Colonel McElwee.

Colonel Wiener?

Mr. WIENER. Yes, sir.

Senator KEFAUVER. How long will your statement take?

Mr. WIENER. Colonel Galusha said 45 minutes.

Senator KEFAUVER. Forty-five minutes?

Mr. WIENER. I can cut it down. I have very careful notes, Mr. Chairman.

Senator KEFAUVER. If you can make your statement in 20 minutes, we have a lot of people here who have waited over to testify this afternoon. We would like to include all of the witnesses who were scheduled here today and I want you to make your points fully, but try not to get into any extraneous matters.

Mr. WIENER. I won't digress.

Senator KEFAUVER. Will you identify yourself?

## STATEMENT OF FREDERICK BERNAYS WIENER

Mr. WIENER. My name is Frederick Bernays Wiener. I am a practicing lawyer in Washington, a member of the firm of Keenan, Kanfer, Wiener & Murphy. Mr. Joseph B. Keenan is my senior partner. Prior to returning to private practice I have been in the Solicitor General's office for some 3 years. Before that time I was in the Army the better part of 5 years. I was originally commissioned in the Judge Advocate General Reserve in 1936 and went on extended active duty in March 1941. Almost immediately thereafter I went down to Trinidad as the judge advocate of the Trinidad sector and base command. I was there until September 1942, and then back to Washington for a tour of duty in the Judge Advocate General's Office, then 3 months with the War Department General Staff, and then out to the South Pacific where I was successively judge advocate of the first island command on New Caledonia, the forward area on Guadalcanal, the Thirteenth Air Force on Guadalcanal, and then I was ordered back to the United States Military Mission to the U. S. S. R. as judge advocate and legal adviser, but I never got beyond Miami Beach because the U. S. S. R. did not see fit to grant me a visa, which I think helps me on some of the inquiries that might be made.

When they finally revoked those orders, I was on duty in the Judge Advocate General's Office again, but by that time I learned the technique of getting out of Washington. I joined the headquarters of the Tenth Army in December 1944 on Hawaii, made the invasion of Okinawa with them on the 1st of April 1945, and was with the military government on Okinawa until the end of June after the island was secure and then I was hospitalized back.

Senator KEFAUVER. You are representing yourself?

Mr. WIENER. I am carrying no torch.

Senator KEFAUVER. Tell us what you think about the problems.

Mr. WIENER. There are three bad features in the bill: The bill as a whole, I think, is a good bill. I think it is time for unification because I was with a mixed unit. A mixed unit such as we had on Okinawa with two systems of discipline just doesn't work. There

are three bad features in the bill: One won't work in time of peace; one won't work in time of war; and there is one that won't work in peace or war. I will take them in reverse order.

The one that won't work at any time is taking the law member off the court and not permitting him to vote and not going into closed session, that is article 26 (b), article 39, and article 51 (c). Now, even if I hadn't known by whom this bill was drafted, I would have been positive it hadn't been written by anybody who ever sat on a court. That doesn't mean that I haven't got a warm affection for my old professor, Eddie Morgan.

(Off the record.)

Mr. WIENER. As I say, I have a very warm and deep regard and affection for Eddie Morgan, and I have had for years, but he has never in his life sat on a court martial and neither did his principal assistant, my very learned friend, Mr. Larkin, because people who have sat on courts martial and people who had been close to the business of reviewing the errors of courts martial would never have undertaken the removal of the one trained person off the court because after all, Mr. Chairman, and gentlemen, I have studied the hearings after the last war and I have studied the hearings after this war and I had a lot of experience in the field. And I know that the basic difficulty with wartime military justice in both wars was the shortage of trained personnel. The difficulties were bred of ignorance, not of original sin. People were just promoted too fast to absorb either judgment or wisdom, or both.

The people with experience on courts who had had peacetime experience were unavailable, and the people who were taken in through OCS, who had to learn how to fire missiles more lethal than the Manual for Courts Martial. So, running military justice during the war was a case of the halt leading the lame and a case of the one-eye lording it over the blind.

Now, many times that I have been the staff judge advocate, I was the only lawyer on an island which had thousands of troops and I used to hold my breath until the records would come back to see if there wasn't some tremendous error born of ignorance.

Now, the great step forward in the Elston bill, or I should call it, out of deference to this side of the Capitol, the Kem amendment, the great step forward of the system that went into effect this February was the mandatory provision of the law that a member of the general court had to be a lawyer. He couldn't be a cavalryman any more. I certainly applauded that. It would have saved me an awful lot of grief during the war. Now, just when you have got the law member on the court, you got him functioning properly, this bill proposes to take him off that. I submit with deference this is wrong for at least three reasons.

In the first place there is the erroneous analogy to a judge and jury because the law officer has not got the functions or the powers of a trial judge. In other words, you are getting a jury trial but without the safeguards of a jury trial.

In the second place, you are transplanting a foreign institution. Now in the British system for the peacetime general court, they would have a judge advocate who was a civilian barrister and he would sit there in wig and gown and instruct the military members of the court martial. He wasn't an officer. That may have been a good reason

why he shouldn't sit with the court. Now it is true that the British in wartime didn't have that kind of fancy paraphernalia. They couldn't do it in the field. We never had that tradition. Our law member has always been an officer of the Army and I submit there is no reason to take him away.

In the third place, you would introduce into it just an awful lot of flyspecking. This bill makes him state the elements of offenses, not anything more, not a full charge, the elements of offenses, those are printed in the manual. You have got those now. All you do is increase the possibility of error and finally you take away this man, this trained lawyer just at the time when he is needed most. Now every person, every officer, who has ever served as law member, and I acted in that capacity once or twice, knows the counsel, the help that a trained lawyer on that court, a trained impartial unbiased lawyer sitting as law member on that court, can give the lay members of the tribunal. I venture to say also that every conscientious line officer knows the help that a law member can give.

Now, I never was law member on a court at which I wasn't president when the president of the court didn't turn to me and say, "Judge, I am awfully glad you are here, you can help us."

Now, I think that the reason the law member was taken off the court, and I say this with great deference to the judgment of those who differ with me on this, the people who drafted this bill just didn't have that experience and I think this is a definitely retrograde step and the only beneficiary would be the guilty man who would profit by errors. Now that is the part which I submit wouldn't work at any time.

Now there is a part that won't work in time of peace and I expect to document my apparently dogmatic statement and that is the provision of article 27 (b) 1, making mandatory the requirement that the trial counsel and the defense counsel of general courts martial, that is page 25, Mr. Chairman, that the trial counsel and defense counsel of general courts must be lawyers at all times. Now at the present time under the provisions of the Kem-Elston bill, in the Army, they should be lawyers if available and if the prosecutor, the judge, is a lawyer, then the defense counsel must be a lawyer. Now that is workable and it is fair. I will agree that in time of war you should have lawyers. Lawyers are proverbially a dime a dozen in time of war. You ought to use their skills to try the cases and relieve the combat people of those details. I think one of the greatest personnel mistakes in the United States Army during the war was to try to run the system of military justice on the peacetime basis of having combat personnel handle it in addition to other duties.

Now, in time of peace, you have officers, line officers, who are really thoroughly trained in the book. I have known such officers with whom I wouldn't argue on a point of law because they had that rigorous and intensive training. But in time of war they weren't available for that type of duty.

But in time of peace it is different. In the first place it isn't necessary and in the second place you can't meet the requirements and I will take up both those points. I don't think it is necessary—and I say that as a matter of experience—it isn't necessary to have lawyers on both sides of a general court-martial case for a simple desertion such

as 6 months A. W. O. L. which you prove just through the morning report, or a simple case of disobedience of the lawful order of a commissioned officer, or the simple case of barrack-room larceny. In the British possessions they try those cases in the police courts. The police officers, sometimes the police sergeants, prosecute. Our Army has got along for 170 years without having lawyers on both sides of general courts in time of peace.

Now secondly, it isn't possible to meet that requirement. Last summer, I served a tour of duty with the Personnel and Administration Division of the General Staff of the United States Army, and one of my assignments was to study the personnel inmplementation of the Elston bill about getting lawyers. The conclusion I arrived at after going into all the data was that you just cannot get sufficient lawyers in peacetime. It is not a sufficiently attractive career by comparison with other public service legal careers. Now, you took their pay, you cut the Army lawyer's pay, the service lawyer's pay, at the beginning of this year. You gave them a single promotion list, true, but that doesn't give them any faster promotion. Then you are up against the question on this committee: Is that going to be the wisest expenditure of the national defense dollar? At page 1174 of the House hearing, there are statements that for the Army to comply with the provisions of the bill as it now stands it will need 307 additional lawyers.

The Air Force will need 476 additional lawyers. There is no statement about the Navy, but at least 800 additional lawyers will be required to make this bill workable. So that never mind about filling up the divisions and forget about expanding the 48-group Air Force to the 70-group Air Force, first we have got to get lawyers. Now, it may be that some people have suggested that the ordinary desertion case shouldn't be tried by general court martial, but if that is the view of the Congress, you ought to do that frankly and come out and say that and not go around the back door by making it impossible by not providing lawyers.

Another thing, this bill has never been subjected to a staff study by any of the three services. Neither, the General Staff of the Army, or the air staff of the Air Force, or whatever the equivalent is in the Navy, ever got a real look at this bill and those people weren't asked and the Judge Advocates General weren't asked, so that this bill was drafted—gentlemen, it would be nice to have lawyers, but nobody inquired whether the lawyers are available, whether the money is there for lawyers. They just went out and wrote a bill and I think I am pretty safe in predicting that if this bill is ever enacted in this form, you are going to have to amend it because you just can't run general courts martial in three services with these requirements for lawyers.

Now the part that won't work in time of war——

Senator KEFAUVER. Before you leave this part that won't work in time of peace, would you make any differentiation as to the types of offenses that should have lawyers, judge advocates general, and defense lawyers?

Mr. WIENER. Yes, sir; I would say this on the basis of my own experience as staff judge advocate: I assume that the provisions of the Elston bill remain in effect, namely, that if you have a lawyer for the

prosecution, you have got to have one for the defense. There are a number of complicated cases which should not, except in the rarest circumstances, be tried without a lawyer. I would say every time you try a case of homicide you ought to have a lawyer. Every time you try a complicated embezzlement such as a PX shortage, you have got to have a lawyer. Every time you have an offense against the civil population which is going to have international reverberations you ought to have a lawyer trying the case.

But the simple cases of the morning-report desertions, the petty larcenies, the simple disobedience, and others, the open and shut cases, and embezzlement—embezzlement is easier now because embezzlement and larceny have been made one offense under the Elston bill, thus plugging up that great loophole—"not guilty" by matching the staff judge advocate's guess against the board of review's guess, and the embezzler gets off. I think that is definitely the task of the staff judge advocate who reviews the papers before trial and recommends trial to see that on the simple cases you don't tie up legal talent, and on the really difficult cases, the serious cases, the complicated cases, you do have lawyers to try them. But these simple cases, gentlemen, it isn't necessary to have lawyers to try a simple desertion case.

I can conceive of very complicated desertion cases. But the ordinary morning-report case, you don't need a lawyer for prosecution or defense, particularly when under the Elston bill you have a law member, who is a lawyer, on the court to keep out incompetent evidence.

Senator SALTONSTALL. How would you insert a provision to clarify that in this bill? Would you leave it to the commanding general who makes the appointment?

Mr. WIENER. Very simply, Senator Saltonstall, I would use the language of the Elston bill and put in "if available." That is all you have to do. There are a lot of cases when it seems lawyers are unavailable, and then it is left to the judgment of the man on the spot. If you have lawyers—after all, speaking as a staff judge advocate, if I had two lawyers when I was with the Thirteenth Air Force and I could find two lawyers for prosecution and defense, I would use them. It was so much easier. I didn't have to hold their hands.

If I didn't have them, that was too bad. But now at least they have a law member, and in time of war, I will agree, all these general court cases ought to be tried by lawyers.

Gentlemen, are you going to appropriate money for 800 lawyers for the Army and Air Force, plus I don't know how many hundred for the Navy to run this bill so that there shall be lawyers on each side of the general court case?

Now, I come to the Court of Military Appeals and I am calling it that because Colonel Galusha suggested I discuss the provisions as they are written in H. R. 4080. I don't think that will work in time of war for several reasons. That is article 67, Mr. Chairman, and I think it begins on page 54.

I don't think that will work in time of war for several reasons: In the first place by providing for the appointment of civilians, you practically guarantee that you get people who won't know about what they have got to decide because they have no background for wartime military offenses.

I mean if you have larceny or murder, it is the same in the Army and in the peacetime population and the fine points of desertion can

be picked up by anyone who is a competent lawyer. There is no mystery about that. But when you deal with military offenses, let's consider the case of Gen. Fitz-John Porter at the Second Battle of Bull Run, or perhaps for the benefit of the chairman, the Second Battle of Manassas.

Senator KEFAUVER. We are always very proud of those two battles.

Mr. WIENER. Yes, and being somewhat of a Yankee myself, for Civil War purposes—they tried Gen. Fitz-John Porter and now what peculiar competence have civilians got to deal with the problem that was presented in the case of Gen. Fitz-John Porter? Take the Pearl Harbor case, what special competence would civilians have had to pass on that? It was significant on the Pearl Harbor investigating committee they had a civilian as chairman, but the committee was composed of military men, and I can think and you gentlemen can, too, of many similar matters which would properly be the subject of trial by court martial.

Senator MORSE. Isn't that one of the most important points that needs to be emphasized? All this civilian criticism of military justice because it doesn't make sufficient use of civilian personnel, that answer is to be found in the fact that you are dealing here with a specialty that requires a special conditioning to do the job based upon experience. Unless they have the military experience, they cannot begin to administer justice within the Army.

Mr. WIENER. May I expand on that?

Senator MORSE. Do you agree with me that Army officers have been too inclined to run away from that for fear that they might antagonize the civilians rather than to come out flat-footedly in support of the proposition that in most of your offenses in the military that they clearly involve noncivilian problems in regard to which civilian justice is not analogous? Am I right or wrong about it?

Mr. WIENER. I think you are absolutely right, if I may elaborate on that. The ordinary civilian—and when I say civilian I am going to mention a little later along that I deprecate the division of our citizens into civilian and military, because we are all citizens and sometimes we are in uniform and sometimes not—I think the important thing is not so much status, but experience. Now the British have a judge advocate general, one man, for their army and air forces, a civilian, but they also pick a man with military background.

Where you have civilians you undoubtedly have people constantly coming in and saying, "My poor Johnnie went a. w. o. l. for 3 days, and they gave him 40 years." Well, if Johnnie goes a. w. o. l. from that nice country club at Fort Myers for 3 days in time of peace and they give him 40 years, somebody ought to be put in St. Elizabeths. But if Johnnie is a. w. o. l. 3 days when his unit is sailing overseas and his buddies are going out to be killed and maimed, then I think 40 years may not be enough.

Now, how can a person without military experience evaluate that kind of offense? How can he evaluate misbehavior before the enemy? How can he evaluate refusal to go on a mission?

We had that problem in the World War. An airman, a brave boy, but he finally got to the cracking point, and said, "This is my twenty-fifth mission and I'm not going." He was in England and the target was in Germany, a thousand miles away. Was he guilty of misbe-

havior before the enemy in England? Well, two branch offices of the Judge Advocate General disagreed.

I had that problem. I was faced with that problem when I was with the Thirteenth Air Force. I don't claim to be anything of a hero. I was faced with the problem. How can I—sitting where lawyers sit—how was I fit to evaluate the motives and the emotions of a man who had gone on 24 missions and then refused to go on the twenty-fifth? Well, I was spared any further testing of my moral stamina because the case never arose before I was relieved.

I submit it is simply absurd to say that civilians are better able to evaluate those things than lawyers.

There is nothing in this bill which requires the experience, and I don't think it is. Mr. Chairman and gentlemen, a question whether a Reserve officer who has a basically civilian status is to be deemed so contaminated by the fact he has worn the uniform and is willing to wear it again that he would be ineligible.

Now, further, I think the way this bill is drawn by putting the emphasis on civilian, civilian leadership for a system of military justice, is simply grist for the party mill because it drives a wedge between the citizens in uniform and out of uniform and it panders to those who talk about the mythical thing, "the military mind." I don't think there is any such a thing.

There are able men in the military and there are others. It is true of all professions—in fact, in a self-respecting democracy every able-bodied citizen sometime or other puts on a uniform.

Justice Holmes used to say, that going to war was an experience everyone had to face. Take our Mr. Stimson, Secretary of War, Secretary of State, and Secretary of War again; he was a Field Artillery colonel. George Marshall was an outstanding military leader and became Secretary of State. Winston Churchill was a battalion commander.

After all now, under existing law and under this bill you still have a civilian President or Secretary, I submit it is utterly and demonstratively unsound to put the capstone of the system of military justice into the hands of people who haven't even had the experience.

Now, it is said, "We have to get confidence, we have to let the citizens have confidence in our system of military justice." Who should have the confidence? The deserters who ran away or the vast majority of decent law-abiding folks who did their duty and faced death unafraid.

I know there are a lot of complaints of improper convictions. I have no doubt there are a few such. There are a few such in every system, but I also would like to call attention to one fundamental truth that Alexander Pope phrased more than two centuries ago: "No rogue e'er felt the halter draw with good opinion of the law."

Now, Mr. Chairman, you have been very generous with time, and there is one thing I would like to put in the record. It is part of an article that covers two points: The nature of an army and wherein it differs from a civilian society; and the objects of military law and how they differ from the objects of civil law.

Senator KEFAUVER. Without objection, it will be included in the record following your statement.

Senator Saltonstall, are there any questions?

Senator SALTONSTALL. I would like to ask this one question: If you eliminate this court of civilian appeals, I am not familiar with this, how or where would you propose to put the final appeal?

Mr. WIENER. I think the system that is now in effect in the Army and the Kem-Elston bill is an admirable system except for two slight changes which I will mention in a minute: One of the best things about the Kem-Elston bill is that it takes the confirmation power in officer cases, that is the ordinary run of officer cases, out of the White House. Because, gentlemen, the statistics show, and I have gone through the statistics, I have gone through all the War Department general court martial orders for the First World War and Second World War.

In the Second World War military justice in officer cases pretty well broke down at the White House because there was always "My poor boy, and so forth." There was too much room for sympathy at the expense of discipline of the Army and the result was: Here is Lieutenant Doaks who went out and got drunk and passed the very elastic limits permitted young men in time of war, and he got so drunk he had to be tried, and he was sentenced to dismissal and he got a reprimand.

Consider the cause of General Jones who, learning that when the next lieutenant gets drunk, is he going to try him and go through that long process? He will give him the same action under the 104 article, and just take his money away.

Now that is one of thet fine features of the Kem bill.

The one suggestion that I would have as to the Kem bill is to provide that one member of that Judicial Council should be a line officer to exercise a disciplinary judgment and that is one fine feature of the Navy system, Mr. Chairman. In the Navy, before a court-martial case goes to the Secretary, it has on there the opinion of the Navy Judge Advocate General on the questions of law, the legal sufficiency of the record, and the comments of the Chief of the Bureau of Personnel, or the Commandant of the Marine Corps, as to the disciplinary features.

Then the Secretary has before him the legal considerations and the disciplinary considerations, and I think it would be helpful in the Judicial Council, as now constituted in the Army, to have one line officer, because, after all, the Judicial Council is a confirmation agency rather than a court of error.

The second change I would have in the existing system: I think there is too much review on a bad-conduct discharge. There is more review on a bad-conduct discharge under the present law in the Army than there is on a dishonorable discharge from the general court. There is one additional appellate step.

Now, the purpose of the bad-conduct discharge would stem from the American Bar Association recommendation which was to introduce something with a little less stigma. "Don't give the man a dishonorable discharge when he is simply a misbehaved boy who is the product of bad home training and bad environment. Give him a bad-conduct discharge."

In order to popularize resort to that bad-conduct discharge and to get away from the habit of dishing out dishonorable discharges, you ought to make it a little bit easier than still much harder.

Those would be the onlv changes.

Senator KEFAUVER. Senator Morse?

Senator MORSE. I have two questions. I think these two articles you put in at the end make it unnecessary for me to ask the questions that I otherwise would present. I think you know from my work in this field in the past that I am trying to figure out procedure that we need to develop in the court martial by way of change to the extent that we need any which will make it possible to permit the handling of these military offenses through military personnel and guarantee to the critics of court martial that justice will in fact be done.

That is why I frequently needle the military into proving why they have to have this procedure rather than a civilian procedure, put the onus of burden on them.

I think this article you introduced here will perhaps be very helpful in showing the difference between your justice problem in the civilian court and your justice problem in the military.

My question is this: Do you agree with me that one of the things this committee ought to investigate very carefully is whether or not when we get through with this bill we have got a procedure with definite breaking points so that the personnel that picks up the case after a breaking point will be entirely independent of the personnel that has handled the case preceding that breaking point?

Let me rephrase it a little bit: I do think we have to watch out that we get an independent administration by each group within the military that has a responsibility for administering justice so that a man that sits on a court does not feel that he cannot act independently because of direct or indirect effect his independence may have on him by the commanding officer. So my question is, Do you agree or disagree that we ought to break our procedure so that the commanding officer himself cannot in any way interfere with the administration of justice for the military court?

Mr. WIENER. I think you have got to answer that, sir, by saying this: I think in the present system you do have that breaking point. You have the breaking point. You have the Board of Review which is wholly independent of the appointing authority, you have a Judicial Council which is pretty well independent of the Board of Review, I don't think that you need worry about that. The advantage of the present system, as I see it, is that you guarantee that the various reviewing agencies shall have had some experience fitting them to evaluate the cases with which they deal, whereas here is the capstone and you put it in the hands of people who have absolutely only blank minds.

On the other hand, it is important to bear in mind that while the commander should not attempt to influence courts in the sense now forbidden by article 88, article of war 88, the commander nonetheless has a very keen responsibility for the maintenance of discipline.

It is not quite the separation the way, let us say, the United States district judge is wholly free from responsibility for the maintenance of law and order. There is the case of General Yamashita who was hanged because he didn't maintain discipline among his troops and didn't care to. After all, the offense of *Yamashita* (327 U. S. 1), his offense was he didn't discipline his troops and he took no steps to keep them disciplined. That was the new principle, that is the Yamashita case, for the rest of it was simply a reaffirmation of what the Supreme Court said in the *Quirin case* (317 U. S. 1).

Senator MORSE. You don't go as far as the recommendations of the American Bar Association?

Mr. WIENER. No, sir; for two reasons: One is the differences between the civilian and the military society which I have outlined in that excerpt which the committee has permitted me to introduce, and second, because there is a decision on the books which holds that you can't take away the power of appointing courts from the President because that is part of his power as Commander in Chief. That was the *Swaim case* (165 U. S. 553), where the Supreme Court affirmed the Court of Claims and this is what the Court of Claims said (28 Ct. Cls. 221–222):

> The power to command depends upon discipline, and discipline depends upon the power to punish; and the power to punish can only be exercised in time of peace through the medium of the military tribunal. If the President has no authority in matters pertaining to military tribunals, unless it be expressly granted by Congress, then Congress, by the simple expedient of exclusively granting authority to appoint court martial, and approve sentences to a few officers of the Army and tacitly ignoring the President, could practically defeat the express declaration of the Constitution, and strip the officer of Commander in Chief, of all real power of command.

They held there that the President had the power to appoint the court, although there was nowhere a statute specifically giving him that power. My disagreement with the American Bar Association is on that point. They have overlooked the case, if they know about it. I think they are basically wrong because they ignored the difference between the Army and civilian society. One is a regimented organization designed to impose the maximum of force against the public enemy, and the other is designed to make people live together in peace and happiness.

Now one other factor: When you give a man the tremendous power over life and death and over the destiny of our Republic that we have to give to commanders overseas—consider, for instance, the power that was General Eisenhower's when he gave the word "Go" in Normandy in 1944. When you trust him sufficiently to do that, when you put the lives of bodies of men under his charge, when you give him the power to give the signal which will send thousands of them to their death within a week, how can you then say, "Oh no; we don't trust General Eisenhower to appoint a court martial for the trial of any soldier in his Army because General Eisenhower is interested only in the prerogatives of the brass." Gentlemen, I have heard that said by one of your witnesses who is a chairman of a high-powered committee of the American Bar Association. Now I submit, with all deference, that just doesn't make sense.

Senator MORSE. This witness has been very helpful, I think.

Senator KEFAUVER. Mr. Wiener, may I ask one question on that: Yould your objection to the Court of Military Appeals be to any considerable extent obviated if it were provided that the members of the court had to have military experience?

Mr. WIENER. It would, somewhat, but there is one other factor that I should have mentioned before that I would like to bring out for your consideration, and it is this: Our experience with the specialized tribunals has been that they haven't attracted the same degree of talent that our courts of general jurisdiction have attracted, and certainly with respect to the Commerce Court, the ill-fated Commerce Court,

our experiences were very unhappy. Now, I assume that this is a discussion between adults. A Court of Military Appeals is bound to be a haven for the lame ducks. Now, that is just the one brutal fact, gentlemen.

I think in answering your question specifically, it would help if you made a requirement for military experience; yes, that would help to take some of the curse off, but I really think that you will get better results in the long run by having a Judicial Council within the service of conscientious, high-minded trained people with a modicum of command experience there as well as judge-advocate experience, and I don't think you will get serious injustices.

Senator SALTONSTALL. But you never then would get a unified policy, would you, between the Army, Navy, and Air Force?

Mr. WIENER. Well, you might have a separate Judicial Council for each service for the time being.

Senator SALTONSTALL. That is just what you just said, was it not? That is what I understood.

Mr. WIENER. When I said "command," I was not dealing with the question of three services. I am all for unification, Senator. I think it would be ideal were we to get to the point of having one judge advocate, one quartermaster and one medical corps for all three services. I think it is silly to have three judge advocates general, but I would fill this Judicial Council, Court of Military Appeals, or whatever you want to call it, with people grown up within the service because on most of the cases with which they deal, you still have review by the President. You have that in the present law, any death sentence goes to the President; any death sentence in this bill goes to the President. But it, as I say—you will help it by insisting on civilian experience, civilian experience of the judges, but our experience with specialized Federal courts has not been so happy, and that distinct danger should not be overlooked.

Senator KEFAUVER. The committee is very grateful to you, Mr. Wiener, and your statements will be placed in the record at this point.

Mr. WIENER. Thank you.

(The prepared statement submitted by Mr. Wiener reads, in full, as follows:)

STATEMENT SUBMITTED BY FREDERICK BERNAYS WIENER

I. THE NATURE OF AN ARMY AND WHEREIN IT DIFFERS FROM A CIVILIAN SOCIETY

According to the late Mr. Justice Holmes, whose first adult years were spent in the Army of the Potomac during the Civil War, "We need education in the obvious more than investigation of the obscure."

It would be well, therefore, to concentrate at the outset on the basic, stubborn fact which underlies the entire problem: An army differs from a civilian society. The object of a civilian government is to enable people to live together in peace and reasonable happiness. The object of an army is to win wars. Not just to fight wars, but to win them. To attain that end we subordinate many features we consider desirable or even essential in a civilian society. In the end, it comes down to a question of values. And no values are secure in a land whose armies have been defeated. At any rate, consider the normal and obvious features of our Government and society which we willingly eliminate from our military organizations.

We have the separation of powers in our civil governments, a system of checks and balances to the end that no one division of the state may dominate the citizens. But in an army we must have one supreme commander. The other system does not work, as witness the Red army in the days of the Finnish war

when control was divided up among military commanders and the political commissars.

We have representative government in our country, down to the level of town councils; we feel that with discussion and deliberation we are more apt to reach a sound result. But in an army it is often necessary to sacrifice wisdom of decision for the sake of having a decision at all. Better speedy action, now, when it is likely to succeed, than the best action a week hence, when it may well fail for being too late. A battle cannot be fought nor an invasion mounted with the leisurely debate and argument that sees an important policy enacted into law. The other method has been tried. Read of the councils of war that General Meade called during the Battle of Gettysburg.

Our Declaration of Independence proclaims as a self-evident truth that all men are created equal. We carry that principle into our Government and our elections: One man, one vote. But an army cannot indulge either the view that all men are equal—the General Classification tests show an eye-opening inequality—or that they can be treated as equals. An army is a hierarchy and the men at the bottom cannot be treated or regarded as the military equal of those at the top, whatever their individual qualifications, and regardless of what the verdict on judgment day may be. No one denies that the methods of selecting leaders, from corporal to multistarred general, stand in considerable need of improvement; yet no one in his senses has suggested that we revert to the good old way of American democracy, back in the days of annual militia musters, when the enlisted men elected their officers.

The civil community cherishes the institution of trial by jury, and it is not simply the members of the criminal bar who proclaim that it is better that 99 guilty men escape than that 1 innocent be wrongfully convicted. An army, on the other hand, cannot afford the luxury of trial by jury, and the fifth amendment of the Constitution specifically excepts from its guaranty of jury trial "cases arising in the land or naval forces." That exception was considered so obvious by the founders that it did not call forth a single word of discussion as it passed through the first session of the First Congress. For the Members of that Congress were, many of them, veterans of the Revolutionary War, and were aware of the difficulties with which our little Army had been held together in that struggle. They were practical men, not abstract theorists, who saw nothing inconsistent in preserving the heritage of jury trial for citizens out of uniform while denying it to citizens in uniform. For if an army must face the problem of the 99 and 1, its decision would be—must be—that the 1 innocent man will have to suffer if that is the cost of convicting his 99 guilty comrades.

The fact of the matter, the stubborn, hard, brutal fact of the matter, is that an army is an organization that sends men obediently to their death, and that it is carefully designed for just that purpose. We had better face that unpleasant fundamental at the outset, lest otherwise we reach mistaken conclusions which may be very costly, and which may result in the destruction of all that we hold dear.

### II. THE OBJECTS OF MILITARY LAW AND HOW THEY DIFFER FROM THE OBJECTS OF CIVIL LAW

Just as the object of an army is wholly different from the object of a civilian society, so also does the object of military law differ from that of the civil law. That distinction has never been better stated than by Gen. W. T. Sherman—and that hard-bitten warrior had been a practicing lawyer before he became a general. Here is what he said in 1879:

"I agree * * * that it will be a grave error if, by negligence, we permit the military law to become emasculated by allowing lawyers to inject into it principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.

"The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the Nation.

"These objects are as wide apart as the poles, and each requires its own separate system of laws—statute and common. 'An army is a collection of armed men obliged to obey one man.' Every enactment, every change of rule which impairs this principle weakens the army, impairs its value, and defeats the very object of its existence. All the traditions of civilian lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of

discussion, else armies will become demoralized by engrafting on our code their deductions from civil practice * * *."

The problem Sherman posed was not a new one. Over a hundred years earlier, John Adams and Thomas Jefferson had also traced it when they were appointed a committee of the Continental Congress to revise the Articles of War after Gen. George Washington had pointed out their insufficiency. Here is what Adams noted in his autobiography under date of August 19, 1776:

"* * * It was a very difficult and unpopular subject, and I observed to Jefferson, that whatever alteration we should report with the least energy in it, or the least tendency to a necessary discipline of the army, would be opposed with as much vehemence, as if it were the most perfect; we might as well, therefore, report a complete system at once, and let it meet its fate. Something perhaps might be gained. There was extant one system of articles of war which had carried two empires to the head of mankind, the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be in vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline. It was an observation founded in undoubted facts, that the prosperity of nations had been in proportion to the discipline of their forces by sea and land; I was, therefore, for reporting the British articles of war, totidem verbis. Jefferson, in those days, never failed to agree with me, in everything of a political nature, and he very cordially concurred in this. The British articles of war were, accordingly, reported, and defended in Congress by me assisted by some others, and finally carried. They laid the foundation of a discipline which, in time, brought our troops to a capacity of contending with British veterans, and a rivalry with the best troops of France."

Nowadays it is frequently charged that the object of the Army's court-martial system is to maintain discipline, and not to administer justice. But that is an inaccurate statement, the result of faulty analysis. The two aims are not opposites. Actually there are two separate problem: First, the ascertainment of guilt or innocence; and second, the object, nature, and amount of punishment.

As to the first, the prescribed standards of the civil and military courts are the same, and indeed any far-reaching or widespread injustice in the actual functioning of the military system would impair rather than enhance discipline.

*The object of military punishment*

As to the second, the standards of civil and military law are entirely different—because their objects are so diametrically opposed. The civil law aims, in some degree at least, to reform offenders; a defendant with a clean record is quite frequently placed on probation after his first offense. But the object of the military law is not reform, at least not until the offender reaches the disciplinary barracks or the rehabilitation center. The object of the military law's punishment is to act as a deterrent, to give the first offenders such a slug that others will profit by that example and not do likewise. In striking a hard blow at the first man to step out of line, there is assurance that his fellows will not be tempted to err in similar fashion. Every person who has ever been around an army knows that this is not just penological theorizing but a fact, and that certain offenses can positively be stamped out by the imposition of stiff sentences. (For instance, jeep stealing: This offense will be endemic if it is charged under A. W. 96 and sent to a special court. But law the offense under A. W. 94 as the misapplication of military property, refer it to a general court, and hand out sentences of 3, 4, and 5 years, and you stop it. That kind of slug will shortly teach even the most obtuse GI not to go joy-riding.)

Harsh? Yes, undoubtedly; but the underlying concept of an army is obedience. And while an army composed of literate free men can be led in large measure by precept, example, and exhortation, there is always a large indifferent segment, and always an irreducible minimum who respond only to fear. It is only through punishment and the fear of punishment that this last group and many in the indifferent group can be made to obey. The army needs obedience, must have it; the civilian community does not need it in the same degree. The army not only wants its men to refrain from striking each other, it wants them all to march in one prearranged direction. The civilian community is content simply to restrain assaults, while letting its members go on about their several businesses. Regimentation? Of course it is, but how can you mount a D-day invasion without regimentation? And how attain regimented obedience unless such obedience can be made attractive by comparison with the fate in store for those who prefer individualism?

Senator KEFAUVER. Mr. Clorety is the next witness, Mr. John A. Clorety, national vice chairman of the American Veterans Committee. Do you have a prepared statement?

Mr. CLORETY. Yes; I do.

Senator KEFAUVER. Your statement, unless you want to read it, will be printed in the record at this place.

Mr. CLORETY. Thank you, Senator.

## STATEMENT OF JOSEPH A. CLORETY, JR., VICE CHAIRMAN, AMERICAN VETERANS COMMITTEE (AVC)

(The prepared statement submitted by Mr. Clorety reads as follows:)

STATEMENT OF JOSEPH A. CLORETY, JR., VICE CHAIRMAN OF THE AMERICAN VETERANS COMMITTEE (AVC)

Mr. Chairman and members of the committee, I wish to express to the committee the appreciation of the American Veterans Committee for the opportunity to present our views on the proposed Uniform Code of Military Justice.

During the recent hearings for the corresponding committee of the House of Representatives, I was happy to be able to endorse fully H. R. 2498, which was the companion bill to S. 857. After careful study of the changes made by the Committee on Armed Services of the House of Representatives, as set forth in H. R. 4080, AVC deems the amended version of the proposed Uniform Code of Military Justice an improvement. Consequently, we endorse the provisions of the code as set forth in H. R. 4080.

As honorably discharged veterans of World War II, the members of AVC have had comparatively recent opportunity to evaluate the operation of military justice at first hand. I do not believe that it is necessary to recite to the committee the many defects in the operations of military justice; I fully realize that the members of the committee have heard these set forth at length repeatedly.

Our experiences, however, led AVC to make the enactment of a code of military justice which would be uniform in substance, interpretation, and application one of the primary objectives of the organization. The most recent mandate from our membership took the form of the following resolution, which was passed unanimously by the Third National Convention of the American Veterans Committee held in Cleveland, Ohio, November 25–28, 1948:

"We urge Congress to adopt a uniform code of justice for all the armed forces so liberalized as to adhere to the fundamental principles of American civilian justice. Specifically, the code should require—

(*a*) appointment of military courts and review of their decisions by a legal department independent of control and influence by commanders;

(*b*) provision of trained legal personnel as defense counsel and to rule on questions of law; and

(*c*) the right of appeal to a civilian court or board from sentences for nonmilitary offenses."

The committee will note that the pending bill does not completely fulfill the prerequisites outlined in the above resolution. We endorse this bill because it meets squarely two of the three essentials in the judgment of the membership of AVC. As to the other, the proposed code partially fulfills our requirements, and it provides sufficient safeguards against subversion of military justice to any individual convening authority's concept of the command function to enable us to accept the proposed code.

Not only does this bill substantially meet the specific requirements outlined in the AVC convention resolution, but it incorporates a number of other reforms which AVC has long sought and which we have outlined in presentations to committees in previous Congresses. Inasmuch as one of our major points in every previous presentation was provision for final review by a civilian court or board, we are especially pleased to note the provision for the Court of Military Appeals, three judges of which are to be appointed from civilian life. Among the changes made by the House committee which we particularly hope that the Senate committee will retain are the provisions that these three judges shall be confirmed by

the Senate and that the reports of the Court of Military Appeals and the Judge Advocates General shall be transmitted to the Committees on Armed Services of the Senate and of the House of Representatives as well as to the appropriate officers of the executive branch.

I have heard some misgivings expressed with reference to the provisions set forth in article 25 (c) (1) with reference to the service of enlisted persons on courts martial. The question arises from the clause "Unless eligible enlisted persons cannot be obtained on account of physical conditions or military exigencies."

The other provisions of this section leave little doubt that it is the intent of the Congress that, when an accused enlisted person requests the presence of enlisted persons on the court martial trying him, enlisted persons shall be included on the court. Probably the saving clause which has led to misgivings should not be eliminated, but I hope that this committee, in its report, and members of this committee during floor discussion of this bill, will make crystal clear the legislative intent of the entire section, and specifically that this saving clause is intended for emergencies and other situations in which eligible enlisted persons absolutely cannot be obtained.

We believe that the proposed code is a long step toward more perfect military justice, and we trust that it may be enacted during the present session of this Congress.

Senator KEFAUVER. The committee will be glad to hear from you at this time. You can summarize your statement and stress any particular matters you wish to, Mr. Clorety.

Mr. CLORETY. The American Veterans Committee generally endorses the pending bill, H. R. 4080. In saying that, I am describing really what we would buy, and we endorse it primarily because we believe it is a long step toward more perfect military justice. We believe it could be, and that is ought to be improved considerably. In particular, under the most recent expression of our national organization, we specifically ask that the adoption of a uniform code of justice for all the armed forces includes specifically the appointment of military courts and a review of their decisions by a legal department independent of control and influence by commanders.

We recognize that the other major specific requirements we had, as well as many of the other points in the existing system of military justice which we felt ought to be corrected, are either corrected fully or at least much progress made in the existing bill. And, recognizing the resistance of the armed forces to the complete divorce of the administration of military justice from the command function, we are prepared to go along with this bill.

We would hope that the Congress would see fit to adopt a system under which there would be a more complete separation of the command function from the administration of military justice. We have had the advantage of opportunities to examine such suggestions as have been advanced here by Mr. Spiegelberg and by Mr. Farmer, and we believe they have made a case for the practicability of such a separation, and we would certainly be most happy to see this committee adopt amendments to the existing bill along those lines. But we will still support the bill, even if the committee does not see fit to adopt those suggestions.

Senator KEFAUVER. Senator Saltonstall.

Senator SALTONSTALL. No questions.

Senator MORSE. How about this point in your resolution by the third national convention on page 2, the third point (*c*):

The right of appeal to a civilian court or board from sentences for nonmilitary offenses.

Will you discuss that briefly?

Mr. CLORETY. There are two schools of thought there, and that phraseology represented something of a compromise. There was a minority school of thought which believed that they should be able to appeal to the Federal courts. The other, and what prevailed, in my view, was that we need something similar to the judicial council as it is set up in S. 857 and where this court of military appeals as constituted in H. R. 4080, in which the judges of that court would be civilians.

Senator MORSE. Give me an example or two of the type of offense and the circumstances under which you would permit that appeal.

Mr. CLORETY. To a Federal court?

Senator MORSE. Under your regulation here to a civilian court.

Mr. CLORETY. The way that I interpret the resolution as it reads is that the provision in H. R. 4080 for a court of military appeals meets our present requisites.

Senator MORSE. For a military appeal?

Mr. CLORETY. That is right; to a court of military appeals as it would be constituted under the terms of H. R. 4080.

Senator MORSE. Provided that we have that court made up of civilians?

Mr. CLORETY. That is right.

Senator MORSE. But you do not mean a direct appeal from the military courts to a civilian court, such as the Federal court?

Mr. CLORETY. No; I do not mean that. We had some pro comments of that view.

Senator MORSE. It is not clear in that resolution, and that was why I was in doubt as to what you meant.

Mr. CLORETY. That phraseology represents something of a compromise; and, like most compromises, it came out not too clear and it needs interpretation, but what the majority definitely and strongly wanted, and what was ultimately the unanimous judgment of the convention, was some provision for a judicial council or court of military review.

Senator KEFAUVER. Thank you very much, Mr. Clorety. This statement will be printed in the record preceding your oral statement.

Mr. CLORETY. Thank you, Mr. Chairman.

Senator KEFAUVER. I thank you, sir.

Colonel Oliver, will you come around and expose yourself.

## STATEMENT OF JOHN P. OLIVER, JUDGE ADVOCATE GENERAL RESERVE, LEGISLATIVE COUNSEL, RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES

Mr. OLIVER. I am Col. John P. Oliver, Judge Advocate General, Reserve, legislative counsel, Reserve Officers Association of the United States.

Senator KEFAUVER. You have a printed statement, Colonel?

Mr. OLIVER. As to my formal remarks, in view of the statement of the chairman of the committee, who wanted me to comment on both 857 and 4080, so far as my comments on 857 are concerned, I will ask to have my statement made before the House committee introduced in this record at this point, with the appropriate correction, be-

cause I understand the language of 857 was identical with the original bill introduced in the House.

Senator KEFAUVER. Will you revise and make any changes you wish in your statement before the House committee?

Mr. OLIVER. Yes, sir.

Senator KEFAUVER. And it will be inserted in the record at this point.

(The document referred to follows:)

STATEMENT OF COL. JOHN P. OLIVER, JUDGE ADVOCATE GENERAL RESERVE, LEGISLATIVE COUNSEL OF THE RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES

Colonel OLIVER. If I may introduce myself, I am Col. John P. Oliver, Judge Advocate General Reserve, legislative counsel of the Reserve Officers Association. I want to thank the members of this committee for extending to me the opportunity of appearing before them today to testify on the subject to the proposed Military Justice Code, S. 857. At any time you wish to interrupt me for a question, it will be entirely agreeable to me.

The Reserve Officers Association requested permission to appear before the Morgan committee at the time that committee was drafting the present bill. We felt that if we had the opportunity to express our views at that time, much of the time of the Armed Services Committee of the House would be saved.

Unfortunately, the Morgan committee did not see fit to accede to our request and we had no opportunity to present our views to them.

As you gentlemen of the committee no doubt know, the Reserve Officers Association of the United States is a voluntary association, composed of Reserve officers of the armed services with some 1,500 chapters located throughout the United States and overseas.

The object of the Reserve Officers Association, as stated in its constitution, is to support a military policy for the United States that will provide adequate national security and to assist in the development and execution thereof.

If it will not appear immodest, and in order that the committee may be advised as to my experience, may I say that I am a member of the bar of the State of California, the bar of the District of Columbia, and the bar of the Supreme Court of the United States, as well as various Federal district courts in the United States, having practiced law for the last 24 years.

And I might say in that connection that I spent some 7 years as a deputy district attorney of Los Angeles and had the unfortunate experience of having hanged a number of men. And I have spent an equal period of time at the other end of the counsel table, where I had an opportunity to, shall we say, pluck a few pans from the burner.

I entered upon active duty in March of 1941 and from that date until September 1945 served in the capacity of either a staff judge advocate or an assistant staff judge advocate for units in varying sizes from an Army post, a division, a service command, a corps, and an army.

I might say that in that connection I worked not on the higher review level as the other gentlemen here who have testified, but rather you might say, at the grass roots level.

Throughout this period of time, I was closely associated with the administration of military justice. I have served on courts martial as president, law member, member, trial judge advocate, and defense counsel.

In other words, I have served in every capacity except as that of the accused. How I escaped that, I do not know. As a result of my service as a member of a court martial, may I read at this point a letter addressed to me while I was in the European theater.

HEADQUARTERS_____CORPS,
OFFICE OF THE COMMANDING GENERAL,
APO_____, U. S. ARMY,
*12 May, 1945.*

Subject: Inadequate sentence by court.
To: Lt. Col. John P. Oliver, headquarters_____.

1. I have read a summary of the testimony in the case of Private _____, Company ____, ___th Signal Battalion and am not pleased with the outcome. I do not consider the court to have performed its duty.

2. The decision of the court is the decision of all its members for which all must be held accountable. It would seem the court undertook to determine whether

this man should have been tried by general court rather than a determination of his guilt or innocence from the evidence. Then, after finding him guilty of offenses warranting severe punishment, only a minor sentence was imposed. It is not my intention, when a case is referred to a general court martial, that any sentence imposed be one which a special court martial might have given. I desire in the future that be kept in mind.

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*Major General, U. S. Army, Commanding.*

The Reserve Officers Association of the United States has been on record by resolution passed at its national convention in Miami in 1947 as favoring a reform in the administration of military justice and more recently at its national convention in Denver in 1948, specifically recommending favorable consideration by Congress of H. R. 2575, heretofore referred to in this committee hearing as the Elston bill.

It is perhaps well known also to this committee that the Reserve Officers Association was extremely active in its support of this bill—H. R. 2575—both during the proceedings in the House and in its passage in the Senate, as title II, the Kem amendment to the Selective Service Act.

It is the opinion of the Reserve Officers Association that the military justice reform bill of the Eightieth Congress was a marked improvement over the system of military justice that had prevailed throughout World War II and that for the first time the primary consideration of command control had been met head-on by the Congress of the United States.

We are of the opinion still that the Elston bill is sound legislation and can see no reason why H. R. 2575, Eightieth Congress, including the provisions for a separate Judge Advocate Corps—that is plural—should not be applied equally to the Air Force and to the Navy.

There may be certain minor changes desirable in the Elston bill in its present form but in our opinion these changes are of a minor nature and easily correctible.

One of the chief differences in the proposed military justice code from the provisions of the Elston bill is the interjection of the civil review board. If this committee deems such civil board of review desirable, it is suggested that it might be a much better procedure to provide for three additional judges of the United States Court of Appeals for the District of Columbia to meet the work load and provide that appeals for military justice be then channeled to our civil Federal courts for consideration as appeals from the district and other courts of the United States.

Such an appeal to be permitted on both the law and the facts. It does not appear to us desirable to create an additional special civilian court operating under the thumb of the Secretary of Defense which would consider only one type of case.

We feel that the sound legal knowledge and the broad experience of our civil appellate judges will bring to the administration of military justice a breath of fresh air at the top that would be extremely desirable.

Unfortunately, experience has indicated that all too often such special boards have become political footballs and where the tenure of office is not fixed, where the advice and consent of the Senate is not required for appointment, special privilege is extended to some and denied to others. Surely all of the functions of this civilian board could be performed much more adequately by the civilian judiciary of our court of appeals.

To summarize my remarks up to this point, it is the opinion of the Reserve Officers Association, as I previously stated, that we should broaden the provisions of the present Elston bill with minor amendments and including the Judge Advocate Corps for each of the three services.

However, knowing the serious study that your committee is going to make of the present bill, S. 857, may I take the liberty at this time to comment specifically on some of the provisions of that bill as it appears in the present form.

In article 1, subparagraph (5), page 3, "officer" has been defined to refer to a commissioned officer including a commissioned warrant officer, but we do find that he is referred to in article 25 (b), page 22, line 9. We feel that this definition should be broadened to include the title "warrant officer."

In article 1, page 4, section (13) and (14) defines "law specialist" and "legal officer" but fails to state that these officers should be qualified as lawyers. This article also fails to define the qualifications of a judge advocate. We feel that these definitions should be broadened to set forth equal qualifications for these officers as defined for law officer as contained in article 26.

Article 2, page 4: We feel that the attempt to broaden the base for jurisdiction of military courts is definitely unsound and feel that the converse should be true. The classes of persons subject to military law should be further circumscribed.

The increase of court-martial jurisdiction is the opening of the door to a military dictatorship. With all due regard and respect to the many fine officers in the Judge Advocate General's Department and there are many fine lawyers there whom I admire and respect and like to consider my friends, I am concerned with two cases reported recently in the public press as being an illustration of the danger of turning too many classes of people over to the military for trial.

The first has to do with a case tried in the military court in Europe where it was reported that the name of the accused was charged with having committed, the names of the members of the court, the identity of the witnesses, the sentence imposed, and whether or not the accused had been executed. None of the public was admitted to the trial and all that was known was that there was a trial going on. Such star chamber sessions are repugnant to all our concepts of the administration of justice.

The next case to which I would like to refer is the so-called Malmedy massacre case. This case is not an abstraction to me as my division was fighting in that general location at the time this crime was committed.

Regardless of my personal feelings toward the perpetration of murder, I am equally outraged at the reported action of the board of review on that case as reported in the newspapers. According to this report, brutality and trickery was employed to obtain confessions upon which the convictions were had.

Recognizing this brutality and trickery, the board still approved the sentence, saying such brutality and trickery was necessary because it was a hard case to break. Such an excuse might be used by a Nazi court or by the Spanish Inquisition on the ground that the end justifies the means. However, it is not consistent with the American sense of justice.

Particular attention is invited to the words in subparagraph (1) for training in describing officers subject to the code. This might easily include college or high school students of the ROTC in summer training camps. Obviously these young men should not be subject to the articles of this code.

Attention is also invited to subparagraph (3), Reserve personnel who are voluntarily on inactive duty training authorized by written orders. Under the provisions of this subparagraph, Reserve personnel studying a correspondence course from which they could receive points toward retirement under written orders would be subject to these articles of this code. The explanation of the Morgan committee is that this is intended to cover officers who are performing week end and flight training.

However, our experience with the administration of military justice leads us to believe that this jurisdiction under certain circumstances might well be stretched to the ultimate referred to above.

Furthermore, we do not believe it is sound in theory that civilians who engage in a 2-hour troop school one evening per month should be subject to the articles of this code, particularly when it is provided in article 3 (a), page 6, that Reserve personnel, while in a status which they are subject to this code, charged with having committed any offense against the code may be placed on active-duty status for disciplinary action without their consent for such period of time as may be necessary to dispose of such proceedings.

The practical effect of this would be to subject any member of the Reserve to be unceremoniously plucked from his civilian pursuits and placed on active duty without his consent in time of peace for an indefinite period at any time within the statute of limitations.

Imagine, if you will, what well might happen to the practice of a physician or surgeon, or a busy lawyer, or an insurance agent, or an automobile mechanic, or a small storekeeper, if the power is placed in the hands of the armed services to take him from his peacetime pursuit at their will or whim. So far as Reserves on extended active duty are concerned, they should be subject to the articles the same as the other members of the armed services.

And may I say in that connection that I cannot urge this point too vigorously, because if there is one thing that is going to strike at the heart of the Reserve program on inactive status, it is to put those officers and enlisted men under the military court-martial jurisdiction.

Unfortunately, I found it necessary from time to time to differ in opinion from some members of the Regular service; and, from a purely personal point of view, I can think of no more effective way to shut my mouth than to leave this provision in the bill.

Now, whether that is desirable or not, I am not prepared to argue.

We are also of the opinion that retired personnel referred to in subparagraph (4) having no active duty to perform and with but slight contact with the military should not be subject to this code.

We are further of the opinion that Reserve personnel retired, subparagraph (5), who might inadvertently, while seeking medical treatment by the Veterans' Administration, find themselves in a military hospital should also not be subject to this code.

Likewise, in subparagraph (11) we are of the opinion that civilians who are only under the supervision of the armed forces without the continental limits of the United States should not be subject to this code. Who knows to what stretches of the imagination the wording "supervision" might reach?

And, again in subparagraph (12) we do not believe that the maintenance of discipline in the military service requires that all persons within an area leased by the United States, which is under control of the Secretary of a Department and which is without the continental limits of the United States should be subject to the Military Justice Code. Render unto Caesar the things that are Caesar's—yes—but preserve the civilians from military courts.

In article 4 (a) we do not deem it advisable that an officer who has been summarily dismissed should be forced to waive any of his rights in order that he may obtain justice. This comment specifically refers to line 7, page 7:

"He shall be held to have waived the right to plead any statute of limitations applicable to any offense with which he is charged."

Specifically, further on this same section, we think the provisions for the substitution of a form of discharge authorized for administrative issuance should have a saving clause which would permit an officer to retain such rights to retirement as he may have had prior to the arbitrary dismissal. The form of discharge also should be changed from "administrative discharge" to honorable discharge.

These comments apply equally to subparagraphs (b), (c), and (d) of article 4.

In article 6, subparagraph (a), the assignment for duty of all judge advocates, and so forth, is subject to the approval of the Judge Advocate General of the armed force of which they are members.

This is done apparently and properly for the purpose of removing the administration of justice from the command influence. However, there is still a fatal defect in that it does not appear that the efficiency reports or fitness reports of these judge advocates are also required to be made by the next superior judge advocate in place of the commanding officer under whom they serve.

The experience of World War II leads us to believe that one of the most effective ways of maintaining command control is through adverse efficiency or fitness reports by the commanding officer under whom the staff judge advocate served. Many an otherwise competent staff judge advocate stultified his conscience and prostituted his profession in the interest of obtaining promotion.

If the efficiency reports and fitness reports and promotions, even temporary promotions, are placed in the hands of the Judge Advocate Corps, this temptation will be removed.

As to subparagraph (c) of article 6, line 8, it is suggested that the words "trial judge advocate" or "trial counsel" be inserted following the words "shall subsequently act as a" and before the words "staff judge advocate or legal officer."

In article 7, subparagraph (b), line 16, page 9, we believe that the words "grounds for" should be inserted between the words "may do so upon reasonable" and the words "belief that an offense had been committed," because a reasonable belief should be based upon reasonable grounds.

In article 9, subparagraph (c), line 23, we feel that it would be better English to transpose the word "only" from the end of that line to the end of line 24, so that the sentence would read "An officer, a warrant officer, or a civilian subject to this code may be ordered into arrest or confinement by a commanding officer to whose authority he is subject only by an order" and so forth.

In article 10, pages 11, line 17, we believe that the word "offense" should be substituted in that line for the word "wrong" because a man might commit a wrong without having committed an offense.

In article 12, line 8, we are undecided as to the meaning of the words "immediate association" and believe that members of the armed forces of the United States placed in confinement should be entirely removed from having to associate with enemy prisoners or any other foreign nationals.

We think an additional provision should be added to this article requiring segregation of sexes where the parties are unmarried. And further, that all

citizens of the United States, in addition to members of the armed forces, should be extended similar consideration.

Under article 15, page 13, we believe that the unlimited power of commanding officers to impose nonjudicial punishment should be circumscribed rather than broadened and we believe further that no nonjudicial punishment should be imposed without the alternative right to trial by court martial and that such alternative right should be granted by legislation rather than by the grace of the head of a department or other subordinate officer. That is in the case of company punishment.

We further believe that the withholding of privileges for two consecutive weeks is excessive. We further believe that the forfeiture of one-half of his pay per month for a period of 3 months is excessive as well as extra duties for a period of two consecutive weeks.

The viciousness of this system is further revealed on page 14, subparagraph (2) (e) (f), which permits confinement for a period not to exceed seven consecutive days, or confinement on bread and water or diminished rations for a period not to exceed five consecutive days.

I am apprehensive of the results of such unbridled power in the hands of a martinet. There is nothing in article 15 that prohibits the constant and continuous and repeated imposition of this punishment, without interruption, upon any individual.

In other words, he could repeatedly get seven consecutive days for an indefinite period at the whim of the commander, and there are commanders that would do it.

We are further opposed to article 15, subparagraph (c), page 15, which permits an officer for minor offenses, to impose such punishment authorized to be imposed by commanding officers as permitted by the Secretary of the Department. This unbridled opportunity to impose punishment without the right to demand a trial is pregnant with possible abuses.

So far as article 17 is concerned, we believe that it is basically unsound.

The history of the squabbles between the armed services during this period in which unification has been attempted would make the abstract judicial approach of a court martial composed of officers of one service trying officers of another service extremely doubtful.

The interservice feuding is a sad commentary upon our combined operations in the past war, as evidenced by the famous Smith versus Smith, Richardson versus Smith, Nimitz versus Richardson cases of the Pacific theater.

Article 18, page 17, again arouses our concern where it is set forth that courts may impose any punishment "not forbidden by the code." It is a primary rule in the administration of justice that a man who commits an offense should know in advance the punishment he is likely to receive and the legal attitude here of permitting any punishment not forbidden, with the forbidden punishments limited only by article 55 of the code will again permit unbridled abuse.

In article 23, page 20, it is suggested that an additional provision be added to permit a superior commander in the exercise of his discretion to reserve special court-martial jurisdiction for himself as provided in the former Articles of War.

And that is so in the case of one command, if he wants to reserve special court-martial jurisdiction, you have a uniformity of punishment within that one command.

As to article 25, page 22, subparagraph (c), line 19 to the end of the page, we believe that this provision should be rewritten in order to clarify its meaning. The words on line 19 "prior to the convening of such court" do not indicate whether it is the intent of the law that this request should be made prior to the first time a court might convene in some other case or whether it means prior to the convening of the court of the case in which the enlisted man is the accused.

The additional language beginning in line 21, "after such a request no enlisted person shall be tried by a general or special court martial," and so forth, does not indicate whether the word enlisted man refers to the special enlisted man then on trial or whether it refers to all enlisted personnel who might then be tried by the same court in that or some other case.

As to article 26, page 23, it is suggested that this article be amended to further provide that law members shall be designated by the Judge Advocate General rather than permit a commanding officer to choose such law members as might be amenable to his wishes.

It further should be specifically provided in this section, as it does not appear elsewhere in the code, that no courts martial shall proceed with the taking of

testimony or evidence, as provided in the Elston bill, in the absence of a law officer.

As to article 26 (b), we are of the opinion that the law officer should be permitted to retire with the other members of the court for the purpose of voting on the findings and sentence.

Our views might be otherwise if the law officer were extended all of the rights, duties and responsibilities of the Federal judge but where he is permitted to rule only on interlocutory questions and instruct on the presumption of innocence and the doctrine of reasonable doubt, and so forth, as set forth in article 50 (c), pages 43 and 44, we feel that the services of this valuable officer will be wasted.

Article 27, subparagraph (a), page 24, line 22, and again on line 24, reading as follows:

"No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case for the prosecution."

The meaning of the word "acted" is indefinite in our mind and might easily be construed that a person who had been a witness or perhaps even remotedly connected with the case might have "acted."

Again in article 27, subparagraph (b) (1), page 25, the term "judge advocate of the Army or the Air Force," or a "law specialist of the Navy or Coast Guard" is indefinite. We are concerned as to whether or not these officers shall be members of the Judge Advocate Corps of the Army or Air Force, or may they merely be officers designated as such by the commanding officer for the time being. We feel that the law should specifically designate these officers as members of the Judge Advocate Corps in each of the three services.

As to article 29, subparagraph (a), page 26, we feel that this article should specifically state that the law member shall not be excused and in those cases where unable to attend by reason of physical disability or other cause that no proceedings may be had in his absence.

As to article 30, subparagraph (d), page 28, we feel that the term "any unlawful inducement" should be defined. We can find nothing in the proposed military justice code that would indicate what may or may not compose unlawful inducement. We believe that the present article of war 24 presently used by the Army and Air Force should be inserted in place of subparagraph (d).

As to article 32, subparagraph (d), page 30, we find one of the most unusual provisions contained in the entire proposed Military Justice Code. After having recited in some detail the steps that shall be taken to provide a fair and impartial investigation prior to trial, this article ends up with a statement in substance that the failure to follow the provisions thereof will not make any difference.

The explanation given by the Morgan committee in this connection is most enlightening where they say:

"Subdivision (d) is added to prevent this article from being construed as jurisdictional in a habeas corpus proceeding. Failure to conduct an investigation required by this article would be grounds for reversal by a reviewing authority under the code and an intentional failure to do so would be an offense under article 98. What nonsense."

If a free and impartial investigation is necessary in the administration of military justice, why should it be jurisdictional and why the concern of the Morgan committee over whether or not a writ of hadbeas corpus would lie. This subsection would seem that we can talk out of both sides of our mouth.

As to article of war 35, on page 31, the provision that in time of peace no person shall, against his objection, be brought to trial before a general court martial within a period of 5 days should be broadened to include in time of war.

It is impossible to conceive of a circumstance where the delay of 5 days in a trial would prejudice any military operation. We have the recent case of Shapiro before the court of claims where the accused was brought to trial 1½ hours after having been served with the charges, with the court located 35 miles away from where the accused was at the time.

This article is also inconsistent with article 40, page 34, which provides in substance that a court martial may, for reasonable cause, grant a continuance to any party for such time and as often as may appear to be just. In this latter article, there is no limitation as to peace or war and there should be no limitation in article 35.

As to article 36, subparagraph (a), page 32, we believe that the modes of proof should be included as a part of this code and not left to the discretion of the Secretary concerned. Modes of proof are as much a part of the administration of justice as are the articles that denounce offenses.

As to article 37, page 32, in an attempt to close the front door against unlawfully influencing the court, this bill leaves the back door open. It is our opinion that in line 14, following the words "commanding officer," the additional words "nor anyone" should be added.

This article in its present form might easily be circumvented by having the commanding officer tell his chief of staff or some other person to carry his remarks to the court and thus avoid a violation of the article. In other words, we feel that the attempts to unlawfully influence the action of the court should be prohibited to all and not merely limited to commanding officers.

Article 41 (b), page 35, limits the preemptory challenges, one to the accused and one to the trial counsel. The word accused is both singular and plural. Thus, if three accused were tried for a joint offense, they would have but one preemptory challenge between them that must be jointly exercised. Each accused should have a preemptory challenge.

Article 44, page 37. This article should be corrected to provide that jeopardy attaches when the court is sworn. Many cases are known where an accused has been on trial for his life before a court martial for the same offense merely because the review was not completed.

As to article 50, subparagraph (a), page 42, we are unable to follow the provision that permits the admissibility of records of courts of inquiry and the sworn testimony taken before court of inquiry to any case not capital and not extending to the dismissal of an officer.

We are unable to understand why such testimony might be admissible where the sentence imposed by the court might be life imprisonment or the case of the enlisted man could be a dishonorable discharge.

We cannot feel that the protection of an officer's commission should be considered greater than the protection of an enlisted man against a dishonorable discharge or any confinement in a penitentiary up to the period of life.

Furthermore, this section would permit the introduction of evidence taken by a court of inquiry even though the court of inquiry did not pertain to the subject matter which the trial might be had by a court martial. Or, that the investigation by the court of inquiry might be of a person other than the accused.

As to article 51 (b), page 43, beginning on line 18 through 22, we do not understand the meaning of this provision. It is heretofore provided that certain rulings by the law member shall be final.

It is further provided that the law member may reverse himself. Therefore the final ruling is not a final ruling. What is meant by the words "if any member objects thereto"? We do not know and recommend that this provision be stricken.

As to article 52, subparagraph (c), page 45, the inconsistency of the provisions for tie vote is unusual. In one instance they are for the accused; in another instance they are against the accused; and in a third instance they are again for the accused.

We feel that under the doctrine of reasonable doubt and the presumption of innocence, all the votes should be in favor of the accused.

As to article 52, subparagraph (a) (2), page 44, we believe that in those cases such as the mandatory penalty of death or life imprisonment that such conviction should likewise be unanimous and in any case where the sentence is life imprisonment or confinement in excess of 10 years that the conviction likewise should require the concurrence of three-fourths of the members of the court, as does the imposition of a sentence.

As far as article of war 56, page 47, is concerned, this provision is extremely salutary. However, the experience in World War II indicates that in some jurisdictions where the commanding general was dissatisfied with the limitations of punishment imposed by the President, the practice was adopted of adding an additional charge of a. w. o. l. for possibly 15 minutes so that the sentence could be in the discretion of the commanding general.

I am not prepared to offer the draft of an amendment to this section to cover such a situation but I feel that this Armed Services Committee in its reports should perhaps suggest their disapproval of such shystering practices.

Article 59, subparagraph (a), page 49. The previous provision of article of war 37 provided that the finding and sentence, and so forth, should not be disapproved unless the error materially affects a substantial right of the accused. In this present subparagraph, this term "materially affects" the substantial rights of the accused. We feel that the use of this new term would deprive an accused of any right of appeal he might have based on errors committed by the court and feel that the former terminology of "materially affects" should be adequate to protect the Government.

As to article 63, subparagraph (b), page 51, we are concerned with the implied permission granted herein for a court on rehearing to try an accused on another and different charge than the one tried in the first instance.

We feel that if the offense was not considered on its merits in the original proceedings that separate and other proceedings should be had rather than attempt to take another bite at the accused at rehearing.

Article of war 66, subparagraph (e), page 53, as has been stated by many of the other witnesses, we do not feel it sound judicial procedure to permit the Judge Advocate General who is displeased with an opinion by one board of review, to refer the case back or to another board of review. Surely no board of review can act honestly and independently under such supervision and restriction.

Article of war 67, page 54. My comments on this provision have been made in the early part of my statement, but in the event this committee feels that such a Judicial Council is desirable, I fail to see in subparagraph (b) (1) where cases that "affects a general or flag officer" are of equal importance with a sentence of death of an enlisted man which would give such general or flag officer cases special priority to go to this Judicial Council.

And again in subparagraph (c), we do not feel that 30 days is sufficient time in which to perfect an appeal to the Judicial Council. The experience during the war in overseas stations would indicate that no enlisted man could possibly preserve his rights under such time limitations and it is suggested that this period be extended at least to 1 year.

In all cases, hearings should be had by the Judicial Council as a matter of right to the accused and not at the discretion of the Judicial Council, as provided in subparagraphs (c) and (d).

As to subparagraph (d), it is our opinion that the Judicial Council should inquire into all of the merits of the case and not limit itself merely to issues raised by the accused who might or might not be improperly or ineptly represented by counsel.

As to article of war 71, subparagraph (b), page 59, lines 21 through 23, we believe that a provision permitting an officer to be reduced to enlisted grade is vicious. We recognize that such a provision was contained in the Elston bill but nevertheless are of the view that such punishment, particularly in the case of an officer of mature years with a family, might be far greater than an outright dismissal from the service.

As to article of war 72, subparagraph (a), page 60, line 15, we believe that the provision for a hearing prior to the vacation of a suspension of a sentence is sound. However, it does not appear from this section how such hearing shall be held or before whom, nor the nature of the proceedings. It does not provide whether or not there shall be a record made of the proceedings or, if a record is made, what shall be done with the record.

The delightful indifference of this section intrigues us further by the use of the term "probationer" in line 16. We can find no definition of this term in the proposed Military Justice Code nor can we find it used elsewhere therein.

Does this suggest that the armed services set up a probation system similar to that in operation in the civil courts with the supervision probation officers, records, and so forth? We recommend that this section be clarified.

As to article 73, page 61, we are of the opinion that the limitation of a new trial based on grounds of newly discovered evidence or fraud on the court is entirely too narrow. We feel that a new trial should be granted in any instance where the interests of justice will be served thereby.

We further believe that a saving clause similar to that now contained in the article of war 53 of the Elston bill covering cases tried during World War II properly should be included in the present bill.

As to article 76, page 63, we do not believe that this Congress should make final and conclusive court-martial proceedings even though they may have gone through the mill. We do not believe that by legislation we can or should deprive the Federal courts of the power to act in appropriate cases by writs of habeas corpus or otherwise and as has been previously suggested in our comments, we are firmly of the opinion that the court of final review should be the United States Court of Appeals for the District of Columbia. Subject, of course, in appropriate instances to the action of the Supreme Court of the United States.

Article 87, page 69, line 19, the term "duty to move" is too indefinite. It is our opinion that this article should be limited to overseas shipments or movements into combat.

As to article 121, page 81, as presently drafted, this article would permit an attorney who brought an action in replevin against an individual to be tried for larceny. That is under a charge of theft, I think.

Under the miscellaneous provision of this bill, article 140, section 7 (c), page 95, we have a directive to commanding officers and others in the naval service. This directive is rather unique to have been contained in a Uniform Code of Military Justice at first, in that it is directed only to officers of the naval service.

Whether the drafters of the bill felt that the officers of the Army and Air Force did not require such a directive or whether doubt as to the capacity of naval officers particularly required this directive does not appear.

While I am quite in agreement with the noble sentiments expressed, I am of the opinion that such instructions are more properly a matter of regulation than a matter of law.

As to article 140, section 7 (d) and (e), pages 95 and 96, I feel they have no place in a Uniform Code of Military Justice. I yield to no man in my firm belief in a divine being nor in the requirements for reverent behavior during divine services.

On the other hand, it is my opinion that the requirements for divine services and reverent behavior have no place in this code and should be a matter of regulation. Again the question is raised as to why this provision should be particularly required only by the Navy.

In section 10 of this same article, it is stated that no officer shall be dismissed from any of the armed forces except by sentence of court martial, and so forth. This section seems to be in conflict with section 23 of the National Defense Act, as amended, where an officer may be dismissed during the period of the first 3 years of his commissioned service. I believe that section 10 should be reconciled with section 23 of the National Defense Act.

I am concerned that in the limited time that has been available to me, I may have overlooked many implications contained in other provisions of this bill. The Morgan committee worked on the drafting of this bill for over a year and my opportunity to examine it has been limited to weeks and has been done at odd times in connection with my other activities. If I have neglected or overlooked provisions of this bill that should be commented on, I ask the forbearance of this committee.

To summarize, at a meeting of the national executive committee of the Reserve Officers Association, February 20 through 22, 1949, by resolution passed by that body, the legislative representatives of the Reserve Officers Association were directed to actively question any provisions of the present or proposed legislation relative to military justice that are incompatible to the best interest of the Reserve components of the armed forces.

It is under the authority of that resolution, together with the two resolutions of our national conventions previously referred to, that I appear before your committee this morning. It is the belief of the Reserve Officers Association that the excellent provisions of the Elston bill, together with requirement for separate Judge Advocates Corps should be extended to the three services; that we strenuously should oppose any attempt to depart from the excellent reforms contained in that bill; that the independence of the administration of justice from the influence of command should be strengthened; that provision should be made for rehearings in appropriate cases of courts martial tried during World War II and that the rights of accused should be protected, consistent with requirements of a military operation.

I thank this committee for their courtesy in permitting me to appear before them this morning.

Mr. OLIVER. Now, if I may comment very briefly on H. R. 4080, which was the revised bill on the House side, I would like to second Colonel Maas' remarks as to the jurisdiction over Reserve personnel that appears on page 4, line 25, and page 5, lines 1, 2 and 3, which read as follows:

> Reserve personnel while they are on inactive duty training authorized by written orders which are voluntarily accepted by them, which orders specify that they are subject to this code—

the practical effect of that would be that all orders issued to all reservists in the future would bear the initials similar to W. O. V. A. For example, in orders issued today by direction of the President, appears "D. P." and so it will bear those initials which means that any Reserve officers who attempt to qualify themselves by inactive duty

training, will automatically come under the provisions of the military justice code.

The chief danger there is, as indicated by Colonel Maas, that at any time within 3 years thereafter, a Reserve officer in his civilian capacity could be dragged by his heels out of his house at night without a warrant, incarcerated in the nearest post, camp or station, and held there for an indefinite period of time until the armed services might get around to disposing of his case.

I am seriously concerned with extending that privilege to those of us who in peacetime remain in our civilian status.

If that thing could be drafted in such a manner as to preserve a person's right to be in his home and be arrested only on warrant, and being taken before a magistrate where you could inquire into the sufficiency of the charges, perhaps, I would have no objection, but as it is now written, I think that a very, very serious danger exists to a man or a woman in their civilian status.

I would like to concur with Colonel Maas also on his comments on four, five and six on page 5, which cover retired personnel, Regular components or retired personnel or Reserve components receiving hospitalization and members of the fleet reserve and fleet marine.

In that connection I would also like to comment on item 11 on page 5, which covers the jurisdiction over civilians, and item 12 on page 5, which continues over through line 5 on page 6.

Very recently we have seen the unfortunate situation, without going into the merits of the case, of this man by the name of Best, who returned here from the European theater, was arrested by members of the CIT as I am informed, in his own home, in the nighttime and thereafter was taken out of his home without a warrant, and taken to the fort nearby or post nearby, and subsequently transferred overseas.

Now, of course, it could be explained that after all Best was guilty, and so he should have been taken back, but we know from our experience in civil life that many times a man may be charged with an offense, and subsequently found to be innocent. We always know that there are cases of mistaken identity, and in my own case in particular, I would be seriously concerned that somebody might come around to my place in the nighttime, thinking I was somebody else, and I would end up in the European theater, and if it was going to happen to me, it could happen to anybody else.

Senator SALTONSTALL. Colonel, how would you change that language? Have you suggested that in your formal statement?

Mr. OLIVER. I have not suggested an amendment. I am merely inviting for the committee's attention the danger of extending this military jurisdiction to civilians, and as far as I am concerned, the only amendment——

Senator SALTONSTALL. I agree with you if you are on active duty—I visualize if you are on inactive duty, this code—it says here on the top of page 6, "Subject to this code." Suppose you are living at home on inactive duty in a civilian section, totally away from the military, and you committed some minor offense on the streets; you had a traffic accident or hit somebody, there was assault and battery, would you assume that this code would apply to you in that capacity?

Mr. OLIVER. Senator Saltonstall, are you referring to subparagraph 3 that starts on the bottom of page 4——

Senator SALTONSTALL. That is the one you called to our attention.

Mr. OLIVER. Yes, sir, but I had gone on from there to these other things, but I will go back to this. No, sir, as I see that that would apply only to offenses committed during that period of time I was on active duty. But supposing I had this unfortunate experience that you have just described during that period of time when I was on inactive duty. Then, any time within 3 years I could be dragged back to the Army and kept around there until such time as they got around to trying me.

Senator SALTONSTALL. That is what I said. Now, how would you change that? What language would you suggest to change that so that it would not apply?

Mr. OLIVER. Well, the amendments I would suggest there would be to strike it.

Senator SALTONSTALL. Well, if you strike it entirely—now, I am speaking from ignorance—perhaps this is a very ignorant question—if you strike it entirely, then do you omit reserve personnel from all application of this act?

Mr. OLIVER. Well, while they are on inactive-duty status; yes sir.

Senator SALTONSTALL. Do you want to go that far?

Mr. OLIVER. While they are on inactive-duty status; yes, sir. In other words, I think, as I stated in my formal statement, that when the Reserve officer is on active duty he should be exactly subject to the Articles of War the same as anyone else. But when he is on inactive-duty status, I do not believe he should be subject to the Articles of War.

Senator SALTONSTALL. If it is not out of place, Mr. Chairman, I would like to ask Mr. Larkin why that was included.

Mr. LARKIN. Would you care for me to answer at this time, Mr. Chairman?

Senator KEFAUVER. Yes.

Mr. LARKIN. That was included, Senator Saltonstall, after consideration of present Army and Navy practice which differs widely.

At the present time, the Army and the Air Force, as a matter of fact, have no statutory provision which gives any court-martial jurisdiction over Reserves while on inactive duty.

The Navy, on the other hand, at the present time has statutory provision which gives them very broad and wide jurisdiction over Reserves on inactive duty in any number of situations, not only when they are on inactive-duty training, where they come and take week-end flying training, and things of that character, but as far as the Navy coverage is concerned now, they are under the jurisdiction of the Articles for the Government of the Navy, even when they wear their uniform, when they take correspondence courses, they meet, as Colonel Maas said, and pointed out this morning, so that we have a complete extreme practice in the different services.

The committee therefore attempted to reevaluate that whole situation, and they decided on this provision which, according to the annotation and explanation provided by the committee was intended to cover the Reserves on inactive duty, when they come in for training, however, and not when they are merely wearing their uniform or taking a correspondence course or any of the other incidental circumstances, and they may find themselves in, as now covered by the Navy.

Senator SALTONSTALL. In my interpretation in the case that I put the hypothetical question, of a man coming out of his house and having an assault committed—committing an assault, or something, on a private street, and so on, would not under your interpretation come within this meaning of this act?

Mr. LARKIN. If I can add several facts to it, I may be able to elaborate what was the intended meaning of this. It was intended then to cover persons on this inactive-duty training over the week ends, principally Reserves who come in and are using heavy expensive equipment, such as aircraft and ships, and things of that character, and not to cover the other incidentals, and to assure that it was done on a voluntary basis, and to assure these Reservists that they would understand what they were doing, because they cannot be called in mandatorily in that fashion, these provisions were set forth that they be given written orders specifically calling them, which they voluntarily accept, and which are set forth in such a way that they become subject to the aritcles.

If they do not desire to do so, why, of course, they do not come in. They have this notice.

Now, if a man comes in on that kind of training, voluntarily coming in, having had the written orders and having been notified of his being subject to the code, and he commits an offense while on that status thereafter, he may or may not, it may or may not be possible to bring him back for trial, depending on the provisions of article 3(a).

Very briefly, you cannot bring him back for trial after this training period if his case can be tried in the Federal courts. If it happens to be an offense, however, which is peculiarly military, and which the Federal courts have no jurisdiction over, and which is an offense which calls for more than 5 years' penalty, then you could bring him back thereafter, otherwise you could not.

Senator SALTONSTALL. So that there is considerable merit to Colonel Oliver's suggestion that the provision be stricken out.

Mr. LARKIN. On the contrary, I would say Colonel Oliver's fears, I think they are not borne out, or we do not feel and did not intend that this would cover the situations that he contemplates, or Colonel Maas contemplated.

It was a very restrictive provision, and the House, to make sure it was clearly understood, added this additional language which set forth exactly the same idea, but it amounts to an extension of authority over reserves as far as the Army is concerned, and a great dilution of authority as far as the Navy is concerned.

Senator SALTONSTALL. Thank you.

Senator KEFAUVER. While we are on that subject, Mr. Larkin, why do you want retired personnel to continue under the code of military justice?

Mr. LARKIN. Well, retired personnel—the Articles of War and the Articles for the Government of the Navy have traditionally had retired personnel of a Regular component subject to the Articles of War and subject to the Articles for the Government of the Navy. That, I concede, is no reason why they should continue.

However, they are, or they continue to be, when they are retired officers of the armed services, they are carried as such on the official registers. They are free to wear their uniforms; they continue to

maintain their titles, and the general idea, I believe, has been that they are to be expected while receiving retired pay, to comport themselves in the same manner as they did when they were on active duty, because they still continue to be officers of the United States.

I say it is a provision of long tradition, but in addition to that, it involves those specific considerations, that they are and continue to be officers of the United States and are receiving retired pay.

Now, Colonel Maas suggested that the retired pay is compensation for what they had—for the active service they had performed. There is a difference of opinion about that, I believe. I believe some construe the retired pay as a continued compensation in this retired state. They are subject to recall at any time to active duty, and so forth and so on.

Senator KEFAUVER. Thank you very much, Mr. Larkin.

Go ahead, Colonel Oliver.

Mr. OLIVER. On the subject of this 5-year provision, we might as well take it up at this time—the subject of this 5-year provision referred to by Mr. Larkin, which is article 3 on page 6:

> Subject to the provisions of article 43, any person charged with having committen an offense against this code, punishable by confinement of 5 years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof, or of the District of Columbia, while in a status in which he was subject to this code, shall not be relieved from amenability to trial by courts martial by reason of the termination of said status.

In other words, I think, with all due respect to the committee, that they failed to set up the safeguards there, because, as a practicing lawyer, I am sure that the chairman is aware that anybody can be charged with anything, and that there is no particular virtue in the fact that it is limited to the fact that a person can be charged with an offense, and this leaves it in the position where a person serves his period of time in the armed services during the war, or else at any other time, and for 3 years thereafter; he is never sure when somebody is going to come around and knock on the door and drag him out of his house and take him back to try him merely because he has been charged with an offense for 5 years.

It raises a number of interesting legal questions. Suppose he is charged with an offense which can be punishable by 5 years imprisonment, and after he is convicted they convict him of a lesser included offenes, which is only punishable by 1 year. Then what?

Or supposing after he has been charged with an offense punishable by 5 years imprisonment, after they get him back into military custody, they make up their minds the charge will not stand up. Can they thereafter try him on a lesser offense than the one they brought him back on? I do not know. But I say the most serious thing about that is that for a period of 3 years after a man leaves the service or 3 years after that particular night when he was serving on inactive duty, he never knows at what time of the day or night somebody out of the armed services is going to come around and drag him out of his house and put him in custody someplace or in confinement, without taking him before a magistrate, without swearing out a warrant; in other words, to go into his house to arrest him. There are none of the protections that we have in civil courts, and I think they should be preserved to the civilians within this law.

Those remarks are also directed to sections 11 on page 5, and 12 on page 5, and as I started to say, here we have the case of this man Best

who is charged with derelictions over in Germany. I say that, without discussing the merits of the case at all. He did get back here to the United States, and he was out in Indiana, I believe, when the CIC came down to his home and arrested him in the nighttime; and the next thing you know they had him over in Germany, and there was a man who never was in military service; he was merely what they used to call in the old days a "camp follower." He was a civilian worker in the PX, and I say it is a very dangerous situation in these United States when the military can come around and arrest a man in peacetime in his own home in the nighttime and cart him off to be tried by a military court.

Now, a comment very briefly on the subject of the law member that was touched on by Colonel Wiener. I subscribe to Colonel Wiener's remarks on the subject of the law member, and I would like to add my own observations as a staff judge advocate that where you have a trained lawyer as a law member he does not have the full powers of a district court, and I think that that law member should be permitted to retire and consult with the court, and give them the benefit of his training and experience in considering the merits of the case.

Senator KEFAUVER. Should he also vote with the other members?

Mr. OLIVER. Surely.

As to the subject of the Judicial Council, there is——

Senator KEFAUVER. Are you talking about the Court of Military Appeals or the Judicial Council of the services?

Mr. OLIVER. Well, as far as the Senate bill is concerned, I am talking about the Judicial Council; as far as the House bill is concerned, I am talking about the Court of Military Appeals.

I believe it is entirely unnecessary to set up a separate new civilian court for the limited purposes contained in this bill. If we felt it necessary that we should have a civilian judicial review of courts martial, and I think we should, the simplest thing to do would be to give us three more judges over in the District Court of Appeals of the District of Columbia, and let them take them over there on the same grounds set forth there, which would have the additional advantage in that you would get away from the narrowness of the viewpoints of a specialized type of court, and they would have a chance to weigh the proceedings in the military courts in the administration of justice with the normal proceedings in civilian courts, and somewhere in between, perhaps, can find a happy medium.

The last item which I will touch on very briefly is the subject of the judge advocate corps. The Elston bill provides for a Judge Advocate General's Corps in the Army, and I think the Air Force should have a Judge Advocate General's Corps, and the Navy should have a Judge Advocate General's Corps, because I think, as professional men, they should be put in the same professional category that we put the medics and the rest.

I thank the committee for the opportunity to appear before it.

Senator KEFAUVER. Thank you very much, Colonel Oliver. Your statement has been very helpful.

Now my old friend, Col. Tom King. Colonel King is national judge advocate of the Reserve Officers' Association.

Colonel Oliver, you are the legislative representative of the Reserve Officers' Association?

## STATEMENT OF T. H. KING, NATIONAL JUDGE ADVOCATE RESERVE OFFICERS' ASSOCIATION

Mr. KING. Mr. Chairman, I have no prepared statement. I concurred in Colonel Oliver's prepared statement before the Armed Services Committee of the House. We worked on it very diligently, and now the House has come up with a slightly different version, and we have gone over that.

I concur with what he has to say, but there are four or five points which I feel are in this bill that are bad. There is one thing left out of the bill which should be included in the bill, if you are going to pass it.

Senator KEFAUVER. Tell us the bad things, first.

Mr. KING. Yes, sir.

In the first place, there is no provision for an over-all Judge Advocate General's Corps. I feel that there should be a Judge Advocate General's Corps in each of the three services.

The Air Force, as I view the law, has a Judge Advocate General's Corps that has never been established because they have taken under the Articles of War, and under Executive order, the Kem amendment, except the last four paragraphs of that bill which establish the Judge Advocate General's Corps—now, they have taken and cut the bill in half by taking a third off the end of it and said, "We don't want this; we want this."

So, they took what they wanted and left the other undone.

Now, the Articles of War, article 8 of the Elston bill, which I like very much and would like to see kept, provides that the law member shall be a member of the Judge Advocate General's Corps or an officer who is a member of the bar of the highest court of a State, certified by the Judge Advocate General to be qualified to serve as a law member. A man who might be a real-estate lawyer might not be qualified to sit as a judge ruling on evidence in a criminal case. So, they require that certificate as to the person who is not a member of the corps.

The Judge Advocate General's Corps in the Army has worked very satisfactorily. It should be in the Air Force, and it should be in the Navy. The Air Force does not get the officers needed to fill up the law vacancies that they have because they are in an over-all picture, and it is nice to wear wings with a prop on them, but lawyers like to be lawyers, and they want their own place in the picture.

There are certain numbers needed for the Air Force, and if they do not have the Judge Advocate General's Corps in the Elston bill there is no determination as to the number except that which they fix administratively, where Congress has said that the Army should have 1½ percent, a minimum of 1½ percent of the officer strength as lawyers in the Army.

The judge advocate corps, to me, is the key to having definitely qualified lawyers who are going to serve with the military and carry on their profession. They are associated with the military; they are in the field with the military; they live with them. There is more to the military law than criminal justice. They have military real-estate problems in the field; they have procurement problems in the field; they have problems of all types that you would find in the law. They even have with various organizations in the field a need for men experienced in wills, in preparing powers of attorney, in making real

estate transactions, so that the troops in the field are able to be taken care of and to be properly advised.

The wording of the statute setting up the Judge Advocate General's Corps is that the Judge Advocate General is the legal adviser not only to the Secretary of the Army, but to all of the officers and all of the branches and services thereof, and it is vital that that thing be made uniform.

As Colonel Wiener very aptly stated, it would be much better if there were one corps for all three services, the same for the medics; that is real unification.

I believe that if the committee considered the present situation, they would find that the Air Forces and the Army have a Judge Advocate General's Corps, and that the Navy is the only one which does not, and they have the law specialists. So if there is going to be unification, and we are going to have a uniform code, let us make it uniform across the board, and not give one one thing as they want it, and another something else, and yet call it a uniform code.

Now, with respect to the law member sitting on the court, I expect that I am the only person who has testified before this committee who has tried a case under the Elston bill, and it is a great satisfaction to know that the law member, a very competent officer, and from his trial of the case a very competent lawyer, was back there talking to the other members of the court.

I knew that the law was going to be fairly and honestly presented to those members, the other members of the court. I knew that he was going to control substantially what happened in that case because of his experience in the field of law, military justice.

The average person going into a jury room—and I doubt that either you or I have had occasion to sit on a jury that deliberated—they do not have the picture, but they are given very minute instructions as to the law, and under the Federal decisions the court even comments upon the evidence, and the weight which should be given it; but in a military court the law member, the only person certified as qualified to sit on that court with a knowledge of the law, is told, "You are the only qualified person here, but you cannot go back and discuss it with these people and vote on it. We have got to have five other officers do that."

Now, if you will read the instructions which the law member is required to give to the court, the effectiveness of that is that they could have it read out of the book just as well, and it is a useless and effortless statement, unless he can get in there and advise them as to the essential elements of the crime, as to the matters of evidence; they want to know why he ruled on excluding the evidence or why he permitted certain testimony to come in.

Senator KEFAUVER. At this point, Mr. Larkin, what was the factual background for excluding—changing the Elston Act on that?

Mr. LARKIN. The examination of the Articles of War and Articles for the Government of the Navy disclosed that their practices differed widely.

The Army, since 1920, had a law member who, during the course of the trial, ruled on questions of evidence, and then at its conclusion retired with the court and instructed it in closed section and deliberated with it and voted with it.

The Navy had no such legal arbiter at all. There was no law member of any kind. So when consideration of that problem came up, the Navy was in favor of having a legal arbiter, in other words, providing a legal arbiter, not having heretofore had one. There was no dispute there.

The point of discussion was one concerning his functions, and while there was a minor difference between the Army and the Navy and the Air Forces on his functions as to finality of his ruling on evidence during the course of the trial, it was ultimately concluded that he should rule with finality.

Within the committee there was a dispute or lack of agreement on the functions at the time the court retired. The Army and the Air Forces favored retaining the legal arbiter as a law member as he now exists in their present services.

The Navy, which had not had a law arbiter of any character, felt that they should go further, and now they were getting a law arbiter, they should get a law arbiter in the form of a civilian judge who should not partake of both the functions of a judge, and thereafter, after the case, become juryman as well, and also charge or instruct the court in closed session off the record, because it is unknown just what legal principles or elements of the crime or other instructions are given by the Army law officer, and they felt they preferred that his instructions on the law in the same manner as a civilian judge instructs the court, should be on the record so that it may be reviewed.

Professor Morgan shared that view with the Navy. It was a matter in dispute, resolved by Secretary Forrestal, who resolved it in favor of the law officer concept, the concept akin to the civilian judge concept; that this legal arbiter should have final say on the ruling with respect to evidence throughout the course of the trial; he should instruct the court on the record so that his instructions are subject to scrutiny to determine whether they are correct or not, and that he should not then become juryman and vote with the members of the court, and that in that form it was cleared by the Bureau of the Budget.

Senator KEFAUVER. That is clear. Continue, then.

Mr. KING. I still say that they ought to give the law member, if he is going to be a member, the power to participate in the verdict, and to determine whether or not he should be able to rule, and he should be able to end it right then and there. He ought to be able to rule right then and there.

I have no objection to it if he is going to be a judge, but if he is going to be something that is half and half, why give up to one service which has not had the experience and to two services which have had the experience, and have fought for that thing. They know from experience that it has been a very satisfactory procedure, and everybody with whom I have talked, who has tried a case under this present bill, knowing there is a good lawyer up there, has gone into the trial with a great deal of confidence that there is a fair deal, and I would rather have a lawyer back there telling them what the law is than to have five or more members back there guessing at what the law is.

The next question is as to the Judicial Council, the military court of justice.

Now, Senator Saltonstall the other day asked a question as to what other system could be used, other than the one that we have now. There are many systems that could be used. Take the three Judge

Advocates General, and make them a uniform military justice court of appeals, and you would have one from each service.

Under this bill they have no authority to make any rulings of finality. They can recommend that they go up to the Judicial Council. They are supposed to be the top lawyers in the service.

Why not give them a function and take the Judge Advocate General from each of the three services; and if you do not want it military, why not send it over to the United States court of appeals, and then if there is anything wrong that you do not like, you can always get certiorari to the Supreme Court, and you get a complete civilian picture of this thing.

It is impractical, as Colonel Wiener said, to set up a lot of special courts all around the place. You never know what court you are in. You never know what rules they are going to make. Let us get it into the court system, then, but do not set up three civilians over there in the Department of Defense; that is not unification; that is not unification of the military services. That is bringing three more people into the picture. Let us allow the military to decide military questions.

Now, if we are going to take it from the military, then put it over into the Federal court system, which is tried and proved. It will be much more practical to do it, and you have got judges who have an over-all picture. They are deciding these cases on habeas corpus now, on questions of jurisdiction only, and they have gone a long way to find out what is jurisdictional, to give them a fair break.

Now, the next thing, if I may say so, sir, to make this uniform military justice is to provide for military courts. We have got set up in European countries and in the Pacific, courts established by administrative fiat. They are set up to try people for things up to and including the death penalty, and they have left it to one man's word in the European theater as to whether they were to die or live or whether they will serve for 20 or 30 years.

We do not know whether they are going to keep up the military courts when the civilians take over or not, and there is a question as to whether a military court can render a sentence of 10 years, if they are going to terminate their functions in 3 years.

Why not determine exactly what authority the military have to set up courts. We read of military commissions; we read of provost courts; we now have military government courts. Who has jurisdiction over whom? The question in the Ybarbo case, which Senator Saltonstall spoke about, was raised as to which court had jurisdiction, if we can believe the press, and I think we can.

Senator KEFAUVER. In other words, you want to take the right of the commander to reduce the sentence away from him?

Mr. KING. No. I want the Congress through its legislative functions to set up or determine what courts will be established, which will affect the trial of citizens of the United States overseas. We have got more civilians over there who are subject to military government than we have got soldiers. It is amazing the number of civilians.

Every State Department employee over there is subject to military government in Germany and Austria. All these people working for ECA are subject to military control in those occupied countries, and they are not entitled to a trial by jury, and there is no system established to give them a right of trial by jury.

You recall, Senator, the case of the court in China, the American court in China, where a man went to the Supreme Court and asked if he did not have a right to trial by jury, and they said "No." But there are enough American civilians over there to get a jury. They can put Government employees on a jury. It has been so decided here in the District in many cases.

Senator KEFAUVER. All right, Colonel King, pass on to your next point.

Mr. KING. I think that those four points are, to me, the most important things. The fact that we need a Judicial Council, which is military—I believe in the military council. I am for the Elston bill; I like it.

There are some changes; they may need more lawyers; they may need more rank for the Judge Advocate General. I think it would be good to pass the bill to all three services, and I think it would work.

I think that the law members should remain on the court and be a voting member.

Senator KEFAUVER. Now, you said you had some points that were good about the bill. What was that?

Mr. KING. Did I say that? There are a number of provisions in there with respect to the punitive articles that really define them, and I think they are excellent.

Senator KEFAUVER. I understood you to say when you started there were four things that were wrong, and one thing that was good.

Mr. KING. I said one that was not in the bill, and that was the military government courts.

Senator KEFAUVER. All right, sir. Is there anything else?

Mr. KING. Thank you, sir.

Senator KEFAUVER. Thank you very much, Colonel King.

Does anybody else here want to testify this afternoon?

The committee will stand in recess until 10 o'clock next Monday; and on next Monday we hope to finish all of the testimony on this measure.

Mr. Galusha, you notify anybody who wants to come and testify.

Thank you very much, gentlemen.

Whereupon, at 4:25 p. m., the subcommittee adjourned, to reconvene at 10 a. m., Monday, May 9, 1949.)

# UNIFORM CODE OF MILITARY JUSTICE

**MONDAY, MAY 9, 1949**

UNITED STATES SENATE,
SUBCOMMITTEE OF THE
COMMITTEE ON ARMED SERVICES,
*Washington, D. C.*

The subcommittee met, pursuant to adjournment, at 10:20 a. m. in room G–23, United States Capitol, Senator Estes Kefauver presiding.

Present: Senators Kefauver and Morse.

Also present: Mark Galusha, of the committee staff; and John Sims, legislative counsel of the Senate.

Senator KEFAUVER. The committee will come to order.

We will continue our hearings on the bill to establish a Uniform Code of Military Justice.

Since our last meeting, H. R. 4080 with some amendments has passed the House of Representatives and has been officially referred to the Armed Services Committee of the Senate, and in considering the bill, the witnesses will, of course, consider the Senate bill, S. 857, and also H. R. 4080 as passed by the House.

We hope to finish our hearings today, if possible. We have several witnesses this morning, who asked to testify, and we will continue over this afternoon if we do not conclude, if that is convenient.

Mr. Galusha, I believe the first witness is General Taylor, representing the American Legion.

The committee, General Taylor, is always glad to have your veiws, and we will be glad to hear you at this time. If you have a statement, you can file your statement, and it will be made a part of the record at this point; and if you wish to stress or discuss any particular points or summarize your statement you may do so. What you have in your hands seems to be a lengthly document.

General TAYLOR. I have here with me, Mr. Chairman, Gen. Franklin Riter of the Judge Advocate General Reserve. He is the department commander of the American Legion for the great State of Utah; and also John Finn, who is here in Washington, who will speak on the Navy angle of the legislation, both having appeared before the House committee on this very same legislation.

Senator KEFAUVER. Will you introduce them, General——

General TAYLOR. Thank you very much. They are my expert witnesses.

General Riter has been in the Judge Advocate General, and now in the Reserve, for the past 18 years. He went with the original cadre to London for the Judge Advocate General, when a branch

office was established. He was the only officer who served in the branch office during the entire period of its existence, and when he came back he served here with the Judge Advocate General as special assistant to the Judge Advocate General from March 1946, and he is so thoroughly familiar and so qualified to speak on this particular legislation.

General Riter.

Senator KEFAUVER. General Riter, we will be very glad to hear from you.

## STATEMENT OF FRANKLIN RITER, OFFICERS' RESERVE CORPS, JUDGE ADVOCATE GENERAL CORPS, COMMANDER, DEPARTMENT OF UTAH, THE AMERICAN LEGION

Mr. RITER. Mr. Chairman and members of the committee. My statement that I made before the House committee, I had to modify it in view of the decision of the Supreme Court recently in the Wade case and in the Barnard Smith case, which is now being mimeographed over at Legion headquarters, and we will be able to file it later in the afternoon.

Senator KEFAUVER. It can be filed, and suppose you use your own judgment in summing up or briefing your statement.

Mr. RITER. That is what I am going to do.

I first want to make it perfectly clear to this committee as to what the attitude of the American Legion is with respect to this matter of military justice. We realize that primarily the purpose of an army is to fight wars and to win them. It is not a social-service organization. It is not carrying on any ultimate purpose except that.

As a consequence, the attitude of the American Legion is and always has been to keep an efficient fighting organization for what it is intended, and our proposals have no purpose that would in any respect impair disciplinary powers of commanders, because without discipline an army is only a mob. I would like that understood fundamentally in our presentation.

Of course, gentlemen, the great problem that has been raised in all this proposed legislation with respect to military justice has been this matter of removing from the military justice processes the undue influence of the power of command. I suppose that problem indigenous and any solution of it must always be tested by its practicality.

Now, my contact with military personnel since returning to civilian practice—and I might tell you that I practiced law for 35 years, and my presentation is essentially that of a civilian lawyer. I have been a member of the Reserve since 1923, but I have gone back to civil life, and I found that a tremendous amount of resentment which has arisen out of this situation has been, and is, among officer personnel who served on general courts and received those notorious "skin" letters from commanders.

I think that you might say that the top level resentment comes from those officers.

I have one of those prize letters that I am keeping as a memento of the war. It is a jewel; and I recently addressed a group of 100 Reserve officers on this matter, and in discussing the problem with them I found that that is where the resentment arises.

Now, there have been many suggestions made.

Senator KEFAUVER. General Riter, without asking you from whom the letter is, could you advise the committee of the form of the "skin" letter that you received?

Mr. RITER. Well, it was a rather amusing affair down at Camp Campbell. I was sent down there by the Judge Advocate General, I think 2 years ago this month, to act as law member of a court, where they were trying a colonel under 96 and 95, and we acquitted him. They charged him with disorderly conduct—the slapping of a pullman conductor.

My only criticism of that colonel was that he ought to have picked the pullman conductor up and ought to have thrown him off the train.

Now, a commanding general down there did not know anything about me. He was a very nice gentleman, but he did not know anything about my background. When I got back to Washington, I got a "skin" letter from him, and it was written on the hypothesis that I was a regular officer; he did not know that I was a civilian lawyer, with a civilian background; he did not know anything about me.

Our verdict in that case, needless to state, I have always felt, was proper, but I did not get sore about that. I just laughed because it was so ridiculous. There was some fellow down there who had not heard the evidence, who did not know anything about the case except what he read in the record, and he writes me a letter condemning my action.

I took it in and showed it to the Judge Advocate General, and just laughed; but it is that type of thing that has created the resentment among intelligent officers. I am not talking about GI's or anything like that. I am talking about intelligent men, men who did not have to go into the service; most of them are lawyers.

Now, on that proposition of meeting that, I invite the committee's attention to a very fine statement made by Mr. George A. Spiegelberg before the subcommittee of the House on this question last March. He represented——

Senator KEFAUVER. Mr. Spiegelberg has testified before this committee.

Mr. RITER. Now, I want to address my remarks to his proposition. You remember that he——

Senator KEFAUVER. Yes, he was representing the American Bar Association.

Mr. RITER. The American Bar Association.

Senator KEFAUVER. And the committee remembers his testimony very well.

Mr. RITER. You recall it, and my mere suggestion for the record here with respect to the appointment of the court by the upper echelon—did he talk about that, of instances of divisional courts?

Senator KEFAUVER. His recommendation, as I remember it, was that where the staff judge advocate general believed that an effort was being made by the commanding officer to influence the court, that the panel of the court be selected from another division or outfit.

Mr. RITER. Of course, Mr. Spiegelberg's proposition reduces itself to this, that the courts be appointed by the echelon next higher. For instance, the divisional courts would be appointed by the Army, Army courts would be appointed by the Army group from panels submitted to the upper echelon. As a consequence, it might very well be under

that process that the court, functioning in division X would be composed of officers from Y, Z, and W divisions of that same army. That proposition he set forth in his very careful statement that you will find in the printed record.

Now, without further reference and without going into detail any further, the attitude of the American Legion on that is this: that under the plan submitted by Mr. Spiegelberg, the Legion has no objection to it whatsoever except it cautions the committee that they are plowing on dried fields. As far as the Judge Advocate General, sitting in the Pentagon, appointing any courts is concerned, it is absolutely a ridiculous proposition because it would only result in the same courts being appointed that the division commander would appoint, because it would come up from panels of the division commander.

Under the Spiegelberg plan, however, and as I read his proposition where the words "Judge Advocate General" are used he means the staff judge advocates of the army command or the divisional command.

Now, in that connection there is that curious bill that Senator Bridges recently introduced in the Senate here, which is a repetition and sehts forth the Elston bill or the Kem amendment haec verba, except with two modifications, and those modifications are that there shall be a selecting authority who shall be the judge advocate of the division commander, and he shall appoint the court.

Well, however well-conceived, that idea did not do anything about the present functioning because in practice today that is exactly what happens under the present law; and under the old law of the code of 1920, that bill is just a delusion because in practice it is always the job of the staff judge advocate either of the base or the division to select the court. It was done in the name of the commander.

What Senator Bridges has in that bill does not mean anything. So, I return to the original proposition that on this American Bar Association suggestion, the American Legion has no objection to it, but it is still in the hypothetical field. The scheme has admirable features, but in that plan it will have to be carefully planned because Mr. Spiegelberg was only talking about combat organizations. He made no references to Services of Supply or Logistics.

Let me indicate to you what that means. Now, the European theater of operations, there our great logistics organization was known as communications zone. The communications zone at one time had as many as five bases or subdivisions of it, and those bases held general courts-martial jurisdiction under the authority of the President of the United States.

Now, the commanding general, General Lee, of the communications zone, exerted no authority on military justice over those bases. The records of trial involving death cases or dismissal of officers went, first, to the reviewing authority, the appointing authority, and then from there up to General Eisenhower for action by him, and then to my board of review.

We sat at the top in England. General Eisenhower did not sit on the death and dismissal cases. It was the board of review, with the Assistant Judge Advocate General that had the last word there.

On the 15½ cases, they went up directly from the bases to the board of review, and Assistant Judge Advocate General.

Now, in drafting this measure with respect to the logistics organization and all those dozen and one other organizations, the statute will

have to be carefully drafted so as to take care of that and it must not only be drafted with the idea of combat organizations affected, because in this man's war the logistics organization was just as important as the combat, so the American Legion cautions again that if the Spiegelberg plan is adopted the statute has got to be subjected to microscopic examination at the hands of clever draftsmen in order to carry all the situations of the Army into it.

Now, I include the Air Force in that, but I do not make any comments as to the Navy, because Mr. Finn will cover that, and I would be leaping into grounds whereof I know nothing; but at that point there, I wish that you will permit me to present the attitude of the American Legion on this matter of one Judge Advocate General for the three services. Yes, emphatically so. We have not only the mandate of the convention on that, but we have, at our executive committee of last January, reemphasized that, and that three corps—it means two other corps that are similar to what the Army has today should be created. It does not mean this hybrid set-up that the Air Force has or the Navy has that they call law specialists or something else. It means the true independent corps such as the Army possesses, and I insist that if we are going to have unification, it had better commence right there, gentlemen.

Now, that has been the Legion's definite mandated policy. We believe in unification, but we believe unification means one Judge Advocate General at the top of it. We do believe that it means three law corps with their own promotion lists as the Army has today.

Now, that brings me to another proposition here which involves article of war 40, under the 1920 code and the Elston bill, the double jeopardy provision.

Senator KEAFUVER. Before you pass to that, General Riter, do you think it is possible to work out the Spiegelberg formula for all of the services?

Mr. RITER. I am talking—I must confine my remarks, sir, to the Army and the Air Force. For me to get over into the field of the Navy I would only be talking about something that would be of no value to the committee, because, frankly, I do not know. That is an honest statement.

Senator KEFAUVER. How about the Army and the Air Force?

Mr. RITER. It could be; it could be.

There is no reason in the world why a statute cannot be drafted that would cover the Army and the Air Force in it, but I, again, out of this abundance of caution, point out that the drafting of that statute must be done with great care in order to cover the manifold complications that arise out of the logistics organization; undoubtedly the Air Force has other organizations in it that should be covered, but in my modest opinion of that, a statute can be drafted admirably to cover that situation under the Spiegelberg formula. Does that answer your question?

Senator KEFAUVER. Yes.

Mr. RITER. Now, old article of war 40 has long been offensive to those members of the legal profession who have done any work in military justice. I have been after that statute for 25 years, because it envisages only the old common law pleas of former acquittal and former conviction, and it did not consider the modern doctrine that

jeopardy can attach before verdict or findings, and if applied literally and with other provisions in the 1920 and in the Elston Act, a man can be tried more than once for the same offense.

In the Wade case, there is a brilliant example of what happens. Now, that Wade case has been my prize child, because I saw it from its beginning in the Seventy-sixth Division. It is unique in the fact that Wade's counsel, from beginning to end, was the same lawyer, Maj. Richard Brewster, of Kansas City. Brewster was Wade's counsel in the Seventy-sixth Division court, and after Wade's incarceration, he became his counsel in the habeas corpus proceedings, and Major Brewster carried it through clear to the Supreme Court.

Now, the Supreme Court decision is not a unanimous one, but both the dissenting and majority opinions are based on the hypothesis that the fifth amendment to the Federal Constitution is directly applicable to the military justice processes. It is a contention some of us lawyers have had for a quarter of a century that it would apply.

Now, there is a curious brief that was filed by Major General Crowder in the famous hearings of 1919 and 1920, wherein he contended that the fifth and sixth amendments, at least the protective provisions, did not apply to military or naval personnel.

I think that in the intervening years there has been a large element in the Army that was of the same opinion, because it grows out of a curious idea that when a man puts on the uniform of his country he surrenders certain rights, constitutional rights, and of course, that is the result of that fiction of contract—when we had the old Army of a hundred and fifty or a hundred and seventy-five thousand men, it was built upon the premise of voluntary enlistment and the enlistment contract, and out of that was reasoned that when a man signed that contract, he gave up certain constitutional protection.

Whatever may be the soundness of that doctrine, certainly it could have no application to our modern citizen army, which is bottomed on the Selective Service acts, because it is ridiculous to contend that a selectee agrees to anything. His Uncle just takes him and puts him in uniform.

Now, there may be reasons behind the arguments, but I have never been convinced that when I put my uniform on I surrender my rights, except as prescribed by the amendments themselves. I expected that I would be tried by court martial and not to be indicted by Federal grand jury, because the amendment says that, but when it was argued that the double jeopardy clauses—the Constitution did not apply to military personnel—frankly, I have never accepted it, and never have—I think the Wade case has vindicated my position on that.

Now, article of war 40 says that a man shall not be tried twice for the same offense, but that a trial is defined as the proceedings before a court, plus the approval of the reviewing authority, and that there is not a trial until the reviewing authority acts, and so, by applying that literally, you reach the conclusion that until the reviewing authority acts, a man can be tried any number of times.

Now, Wade and a companion were charged with rape of a German woman. Incidentally, the companion was acquitted. The trial went clear through with the prosecution and the defense submitting their testimony and argument of counsel. The court retired to deliberate upon its verdict.

After a time it came back in open court and turned to the trial judge advocate and said, "We want you to produce two more witnesses, the father and mother of this girl," and then court was recessed until those witnesses were produced.

Now, there was a complete trial there, with the court deliberating for its findings.

A few days later, the commanding general of the Seventy-sixth Infantry Division withdrew the charges from that court, and transmitted them to General Patton of the Third Army, with an endorsement to the effect that due to tactical conditions it was impossible to proceed with the trial of that case, and asking him to take jurisdiction and to try Wade.

Now, in the record that went up to the Supreme Court there is a very fine exhibit indicating the tactical situation with respect to the Seventy-sixth Infantry Division at the time the offense was committed; at the time of the trial, the position of General Patton's rapidly advancing Third Army into the heart of Germany, and General Patton was not out there trying soldiers for rape. He was trying to get into the heart of Germany. So, he referred that case back to the Fifteenth Army, which was back within 40 miles of the place where the offense was committed, with an endorsement reciting the fact that the tactical conditions did not permit him to try him.

Wade was put on trial the second time before a court appointed by the commanding general of the Fifteenth Army, and his counsel, Major Brewster, had caused to be transcribed the entire record of that first trial, and at the opening of the trial, before the Fifteenth Army, he placed in the record this completely transcribed record, and entered the plea of double jeopardy.

The court, applying article of war 40 literally, because you will see that in the first trial it had not been acted upon by the approving authority—it had been withdrawn—overruled the plea. Wade was found guilty, sentenced to life, and his conviction was reduced by the commanding general of the Fifteenth Army to 20 years, and Wade was brought to this country and incarcerated at Leavenworth.

Thereupon, when Major Brewster was relieved from the service, he commenced action under habeas corpus proceedings in the United States District Court for the Eastern District of Kansas before Mr. Justice Murrow who, as I recall, was sent down from the tenth circuit to sit as the trial judge and hear that case. Judge Murrow turned Wade loose.

The Government appealed to the circuit court of appeals, and the circuit court of appeals reversed the trial court and finally Wade was granted certiorari in the Supreme Court; it went to the top Court.

Now, involved in that case were two problems: First, did the fifth amendment, the double jeopardy clause of the fifth amendment, apply to military justice processes? If so, is article of war 40, as it stands, on its face, unconstitutional?

Now, when that case came up to the board of review in the branch office, it came to our board of review No. 4, composed of three very fine lawyers: one a major from Scottsbluff, Nebr.; Major Meyers, who is now a partner in one of the larger law firms here in Washington, and Major Anderson, of Center, Tex.; three very skillful, conscientious men.

In their opinion, they held that the fifth amendment directly applied, and that the plea of a double jeopardy should have been sustained.

Gen. Edwin C. McNeill was Assistant Judge Advocate General and when it came to his desk for approval under that statute of fifteen and a half, I saw the opportunity in that case to produce this issue with regard to the fifth amendment, and with regard to the constitutionality of article of war 40, and as a result of the deliberations in the branch office, General McNeill wrote an endorsement that has been quoted right straight through in this case, wherein he refused to adopt the literal reading of article of war 40, and adopted the principles of double jeopardy as announced by the Federal courts under the fifth amendment and applied them.

Then, he pointed out the fact that the matter of imperious necessity entered the case. If the courthouse burns down in the middle of a trial—you gentleman who have been lawyers, have been through that thing—the jury disagrees, where you have got a disqualified juror in the box, there are all those questions of emergent cases, that where the trial judge can stop the trial right there, and then order a new trial before a new jury.

Well, General McNeill, in his endorsement, points out that this situation with regard to the rapidly advancing Seventy-sixth Division and the Third Army in military justice processes produced an emergent or imperious necessity, and, therefore, the action of the commanding general of the Seventy-sixth Division in withdrawing those charges was equivalent to the trial judge ordering a new trial when the courthouse burned down, and burned all of the records.

The majority opinion of the Supreme Court adopts that theory, and refuses to take the literal reading of article of war 40. The result is that, in my opinion, I informed the House committee, that article ought to be rewritten, and the Wade case was argued just the day before I appeared before the House committee. I told them at that time that they were going to have to rewrite that article, and if I do not leave any impression here this morning other than this, gentlemen, in view of the Wade case, I ask that article of war 40 be rewritten. It must be, because we must get rid of that archaic idea that there cannot be jeopardy before verdict.

Sure, in the old days in England, there were only the two pleas, and that is what article of war 40 was based on, but the Supreme Court now has made it impossible to leave article of war 40 in its present form, and we lawyers who for 25 years fought that article have seen the day when it is going to be taken off the books.

Now, that brings me to the second case that the Supreme Court decided, and that is the notorious Bernard M. Smith case involving the pretrial investigation under article of war 70.

Now, I wrote the opinion in the hearing before the board of review No. 1 of the branch office at Cheltenham. Smith's guilt never entered into this long piece of litigation. He claimed that that pretrial investigation under article of war 70 of the old 1920 code that the carrying out of it and all of its manifold details were mandatory, and that a violation of any of it in any substantial manner would rob the general court of its jurisdiction, and hence the issue could be raised on a collateral attack by habeas corpus.

Now, the position of the Judge Advocate General—and I am not referring now to General Green, I am using that term generically—

has been vacillating on that problem, because the early decisions or opinions of the Judge Advocate General in 1920 held just that: That the compliance with Article of War 70 was mandatory, and unless there were substantial compliance with it, the court did not have jurisdiction.

But early in the Mediterranean campaign, a case arose that went to the branch office of the Mediterranean theater, and we reversed that line of decisions of the Judge Advocate General, and held that it was directional only. That is the Floyd case, and it has found its way into American jurisprudence almost as much as the Dred Scott decision.

My branch office board of review followed the Floyd case, reasoning that that was directional; that it was not intended to give a man two trials because the argument that Smith makes here was that he virtually grants him two trials.

The Supreme Court has definitely held that it is not jurisdictional, that it is directional, and the consolidated justice code here in the bill that passed the House, the section governing that, that is articles 30 through 35, follow the theory of the Floyd case, that it is not jurisdictional; but provides definitely that violations of the provisions of it, when the Court's attention is invited to it, gives him the right to a continuance, or he may have the Court direct that the evidence, certain evidence, be discovered.

I think that the draft, both in 857 and in the Brooks bill, fully cover the situation and now protect an accused, because certainly it was not intended that a man should have two trials, one an artificial trial before an investigating officer, and then one of the formal trials.

I think that the draft of it now as it appears in the Brooks bill covers the situation admirably, and added to it is the decision of the Supreme Court, and I think that that very annoying feature that we have had for a number of years here, and which, by the way, the Federal courts, the trial courts—we have had any number of those decisions in the last 2 years—part of them adopted the theory of the Floyd case, and part of them followed the notorious Hicks versus Hyatt of Justice Hicks here in the middle district of Pennsylvania.

We had the utmost confusion in that, but the Supreme Court has clarified that.

If I may for just one minute—I notice in my notes here that I should return to the matter of undue influence upon the court by the appointing authority.

Senator KEFAUVER. Before you do, General Riter, Mr. Simms of the Legislative Counsel's Office is helping us with this bill. He is very able and capable. Would you suggest a rewriting of old article 40, which is contained in section 44 of this bill? Perhaps, Mr. Simms will want to confer with you about it?

Mr. RITER. Well, I will be very glad to do it, if that is Mr. Simms' pleasure on that. I would very much like to do that.

Senator KEFAUVER. What happened to the Hicks versus Hyatt case that you are talking about?

Mr. RITER. That was a case——

Senator KEFAUVER. I know the case, but what was the final determination?

Mr. RITER. Well, Colonel Hughes is here this morning, and he can tell you more about it than I can because he was the one who got his fingers burned on that case, but it has been the source of this con-

fusion because I think, Mr. Justice Hicks, sitting there, he was sitting there as a trial judge at that time; he was afterwards promoted to the court of appeals, I think—he entirely misconceived that situation, but there were some extra-collateral matters, and I think Colonel Hughes would probably be able to tell you about it.

Senator KEFAUVER. Well, we do not want to go too much in detail.

Mr. RITER. Well, anyway, the doctrine of Hicks versus Hyatt, whatever it was, has been thrown out of the window now.

Now, returning to that matter, if I may, this matter of undue influence on the court, my boards of review, and I speak that way because I was chairman of the original Board of Review in the ETO, and finally when we had five, I was selected as the coordinator of all of them—now, those boards of review, by the way, were all Reserve officers and all civilian lawyers; General McNeill was the only Regular officer there in it. We were all Reserve, practically, or AUS, all practicing lawyers. General McNeill, of course, was the daddy of military justice for 30 years. He was a graduate of the Academy, and a graduate of Columbia Law School, and a wonderful man; he is a man of wonderful integrity, intellectual integrity. But, his staff consisted of civilian lawyers, if you please, in uniform.

I mention that to you to show the background of what kind of a court we were operating there. Now, we operated those boards of review as a circuit court of appeals, because of the superior powers we had been given by the commanding general of the theater.

Now, what we were watching for was this matter of influence of the appointing authority on the court. We were handicapped because we were not in a position to go outside of the records, but if there were any papers attached to the records which gave us even a suggestion that there was something wrong, we always called for an investigation to find out what had happened behind the scenes. But I want to tell you frankly, gentlemen, that, in general, that stuff was not there, and we could not get it there, because it would have a very brave young captain who would have jammed into his record some communication from the commanding general.

But, nevertheless, let me tell you something: The bright thing about the administration of military justice in the ETO, as it developed, we did develop a great group of defense counsel there who would do that very thing, and the reason for it was simply this: That most of them were Reserve officers, and, frankly, they did not care what happened. They were fundamentally lawyers and they remained lawyers, glory be to them, on that thing, and so on occasion we did get that.

They would just jam it right into the record. There is one brilliant record there where he put the letter of the commanding general, the commanding general's letter in, and to the credit of the commanding general, he let it stay there.

Senator KEFAUVER. General Riter, the main thing the committee is interested in is how frequent was this interference by the commanding officer?

Mr. RITER. I cannot tell you because I sat on the higher echelon, that is just what I am telling you. Our records would not show it.

Senator KEFAUVER. But your records would not show it—even if they did not, you would have some idea as to whether there was frequent interference.

Mr. Riter. It would depend entirely upon who the commanding general was. I want to tell you that I am so fair on this thing, we were fortunate in this war in our divisional commanders. I had the opportunity and the pleasure of knowing a great number of them personally, and discussing this matter with them, and I know how sensitive they were on it, and I know how seriously they took their responsibilities on it, and there was a great group of them that were meticulous in their attitude.

On the other hand, there were commanding generals or commanding officers who did not seem to realize their relationship to the military judicial process and, as I indicated in the early part of my statement, there was undoubtedly a great number of cases where they did that, and the only reason I can tell that to you is not from something that happened to some GI, but from what my fellow Reserve officers told me today of these prize "skin" letters that they have. Now, that is my source of information.

On any official business coming through the record of the trial, very rarely did it appear. Whenever it did, we knocked the conviction down, so I have this suggestion, to make in that connection again, and that is that there be somewhere a provision made that all communications from the commanding general, if the present system is kept, must be attached to and made a part of the record.

Now, that is going to bring me to the final proposition, and then I will retire, and that is that provision in article 37 of the uniform code. That is the one that prohibits undue influence upon the judicial process.

I proposed before the House committee that there be written into that a penal provision making a violation of that indictable in the United States district court, and I have no occasion since that time, upon further reflections, to change my opinion on that one bit.

Now, over there if you will look at the House proceedings, they raised the constitutional question on me, and I anticipated it. They said, "How can you indict the man? Where do you find a court if he commits this offense in China or Liberia?"

Well, my answer is, look at the Blackmer case. Blackmer committed his offense at Paris, France. The offense was committed against the United States Senate here, and did they deny jurisdiction? If a commanding general violates this thing in China, or over in Africa, it is against the processes of the United States of America, and you can commit that offense any place, and it is easy enough to write—it is not a question of jurisdiction, it is a question of venue and indict him in the district court in which he lands in this country.

Well, listen, under our form of jurisprudence, in the famous Formosa Gold case in San Francisco, that is just what happened, and I insist that if we put a penal provision of a classic $10,000 fine and 2 years in jail, that you will stop this whole thing, and I repeat it.

Now, it is perfectly true that my friend Spiegelberg and my friend Bryan thought that it was highly dangerous, but I cannot see if they were going to be consistent on this matter why they will not go along with me on that, and I ask that to be seriously considered by you gentlemen.

Senator Kefauver. Now, General Riter, there is a penal provision placed in there.

Mr. RITER. Yes; but that is military justice——

Senator KEFAUVER. What is that number?

Mr. RITER. No. 98. Look at what you have got there: It is triable before a military court, and if you have got a picture of some outraged second lieutenant preferring charges against his command general, it does not mean anything.

Mr. Spiegelberg and Mr. Bryan, in their testimony, both admitted it did not mean anything. You have got a prohibition without any teeth, and I want to put teeth in it.

Now, with regard to the new high court, you will notice in that section that it has been modified definitely to meet the objections we made in the House. It has created tenure, and has created qualifications. As that section was originally drafted, it was thrown together without any thought, so that has been corrected, but there is one part that has not been corrected, and that is that appeal to that military court of appeals is a fragmentary thing on points of law and only law, and that is just the thing that we have been up against in the circuit court of appeals, because any of you gentlemen who have ever taken an appeal in the circuit court of appeals from a jury verdict know what you are up against: The court looks at the record, and if it says there is substantial evidence, why, you are just out of luck, and that is just what this does.

Now, I propose that that military court of appeal should have authority to weigh the evidence, judge the credibility of witnesses, determine controverted questions of fact; of course, taking into consideration always that the trial court saw the witnesses and heard them, but that, I believe, increased authority should be given to them.

The Brooks bill has not got it. It is just an appeal.

Senator KEFAUVER. It gives that authority to the board of review.

Mr. RITER. I want that authority in the court.

Senator KEFAUVER. One other question: Do you think the Court of Military Appeals—that there should be a requisite qualification that the members should have military experience?

Mr. RITER. Most certainly, I do; because this thing is not all one-sided, and I have told my fellow lawyers time and again, and Mr. Spiegelberg and Mr. Bryan, both being fine soldiers, recognize it, and it runs through their testimony.

Listen, you cannot take a man who has practiced civil law and put this task on him. You are going to get just that kind of thing out of it, if you do. I say that they should be composed of men who have had definite military experience, not only military experience but military-justice experience.

Now, in concluding, there is just one more thing, and that is that article, article 140, that dreadful delegation of authority proposition to the President. The Brooks bill repeats what the original draft did.

Now, there are some of us lawyers who have worked and lived under the First War Powers Act and the Second War Powers Act with its broad delegation of authority. Certainly, there is no objection to the President of the United States delegating his authority to his Secretary of Defense or to the Secretaries of the three services.

It is absolutely necessary, and the President, in performing his multifarious duties, must have that power. But what the American Legion objects to is that authority of those subalterns delegated down the

line because in the First War Powers Act, that is what we got up against, with the authority starting out with the President and landing here at the end, with three or four subdelegations, and I say to you when a man's life is at stake, or where he is going to receive a dismissal or dishonorable discharge, that we do not want some thirty-fifth assistant secretary passing on that authority. I do not want to see the authority to confirm death sentences or dismissal of officers delegated.

The President should act on that, and if you will read the proceedings before the House committee, you will see that they get into that fine-spun discussion as to delegation of judicial authority under the notorious Kunkel case, and we never did know what the Kunkel case meant, in view of the Attorney General's opinions on it, and I do not believe that the President of the United States should be allowed to delegate that authority to confirm death sentences or dismissals.

Yes, delegate the other authority but not below the secretaries of the services, or the under secretaries. Do not let us get it clear down below, with the janitor acting on it, because that is, if the First War Powers Act is any measurement, that is just what you want, the uniformed janitor acting on it somewhere down the line.

Thank you, gentlemen.

Senator KEFAUVER. General Riter, then, you would rewrite lines 3 and 4, page 94 of the bill, H. R. 4080?

Mr. RITER. Yes.

Senator KEFAUVER. Thank you very much, General Riter. Your statement will be placed in the record at this point.

(The statement referred to is as follows:)

STATEMENT OF BRIG. GEN. FRANKLIN RITER, ORC, JAGC, COMMANDER OF THE DEPARTMENT OF UTAH, THE AMERICAN LEGION

I. INTRODUCTION OF WITNESS

The witness appears on behalf of the American Legion, the largest veterans' organization in the United States. He was graduated from the law school of Columbia University in the city of New York, in June 1910, and is a member of the bars of New York, Oregon, California, Utah, and Texas. He has also been admitted to practice before the United States Supreme Court and numerous district courts and circuit courts of appeal of the United States. He is also licensed as an attorney to practice before the Treasury Department of the United States, and the Tax Court. Except for the period he has been engaged in military service, he has continuously practiced his profession before various courts of the Rocky Mountain and Pacific Coast States. He is a member of the Judge Advocates Association and the American Bar Association, and is a member of the property, probate, and trust law section of the latter association. For many years he was chairman of the property section of the Utah State bar.

The witness was commissioned as a captain in the Officers' Reserve Corps of The Judge Advocate General's Department in October of 1923. He was active in the Reserve continuously for 18 years, during which period of time he served two tours of active duty as then provided by law and regulation. During the entire time he concerned himself with the matter of military justice. In April 1941 he was called to active duty in the grade of lieutenant colonel, and reported for duty at the Office of The Judge Advocate General in Washington, D. C., where he served as a contract coordinator until June 30, 1942, on which date, in the grade of colonel, he sailed for England as a member of the original cadre which established the branch office of the Judge Advocate General with the European theater of operations, at Cheltenham, England. This branch office was established by order of the President early in 1942, pursuant to the provisions of then existing article of war No. 50½. This office exercised its appellate jurisdiction over the courts martial of the theater until it was terminated by order of the President in February of 1946. The witness was chairman of the original

board of review in the branch office as constituted by the President, and upon the increase of the panels of the court to five, he acted as coordinator of the boards of review. The witness is the only officer who served in the branch office during the entire period of its existence. Upon his return from Europe in March of 1946, he was engaged as special assistant to the Judge Advocate General. He was appointed by the President to the grade of brigadier general in the Officers' Reserve Corps on August 28, 1947. Since he was relieved from active duty on August 31, 1947, he has been engaged in the private practice of law at Salt Lake City, Utah.

During his tour of duty in Washington from March of 1946 to August 31, 1947, his duties primarily involved the preparation for trial and trial of habeas corpus actions instituted by former military personnel who were incarcerated in various disciplinary barracks, penitentiaries, and reformatories in the continental United States. Since his return to civil practice he has kept in close and continuous contact with the Office of The Judge Advocate General with respect to litigation passing through that Office involving military justice, and also with congressional legislation pertaining to the same subject.

The witness appeared before the War Department's Advisory Committee on Military Justice appointed by the Secretary of War on March 25, 1946, and there expressed his views as to the administration of military justice during World War II, and proposed corrective legislation. He was intimately acquainted with all legislative processes leading to the enactment of chapter II of the act of Congress entitled "An act to amend an act entitled 'An act for making further and more effectual provision for the national defense, and for other purposes,' approved June 3, 1916, and to establish military justice," approved June 4, 1920 (41 Stat. 787), as amended by title II of the act entitled "An Act to provide for the common defense by increasing the strength of the armed forces of the United States, including the Reserve components thereof, and for other purposes," approved June 24, 1948 (62 Stat. 627).

II. FUNDAMENTAL CONCEPTIONS OF THE AMERICAN LEGION WITH RESPECT TO THE ADMINISTRATION OF MILITARY JUSTICE

1. The American Legion recognizes the fact that the ultimate and only purpose of an army or a navy is to fight battles and win them. They are not social-service organizations and their only justification is found in their ability to defend the homeland and to defeat in combat enemies of the country. As a corollary to this proposition, the American Legion also recognizes another vital fact, and that is that there can be no democracy on the battle line. The nature of armed conflict prohibits other than a strict obligation of every officer and soldier to obey orders. The process of giving orders and of receiving orders and obeying them is discipline. Any action which tends to destroy disciplinary control or weaken the links of command can only result in disaster. If a supreme commander is held responsible by his civil superiors for the conduct of a campaign or a battle, he then in turn has the right to demand that every man who serves under him will obey his orders. Nothing more or less will satisfy the dire necessities created by battle conflict. The maintenance of discipline is not a mere matter of battle control. Discipline on the battle line is the sequence of the formation of habit channels in men. Disciplinary control commences in the basic training of a soldier and the whole purpose of training is to instill in the individual habits, both in action and in thoughts, which produce instant compliance with orders. Obedience must become automatic, both in the indivdual and in the unit. Training is a process of education having for its ultimate purpose a self-controlled and self-disciplined individual when he is presented with a crisis. Discpline has a further purpose than that of the successful execution of battle plans. Discipline is also intended to educate a soldier in the great skill of protecting himself against the hazards of a battle. It is almost axiomatic that a well-disciplined military unit will suffer far less casualties than an untrained group. Both the first and second phases of the "Second Thirty Years' War" provided abundant proof of this assertion.

Therefore the American Legion proposes no program which will hinder, impair, or injure the discipline of our armed forces.

2. One method of the administration of discipline is well illustrated by the action of the Red Queen in Alice in Wonderland. Her method was very simple and probably effective. She had but one judgment and but one sentence: "Off with his head." There is much to be said in favor of such a discipline or judicial process. The Red Queen undoubtedly inflicted great injustice upon the innocent,

but she certainly did execute the guilty. No guilty man escaped. Fortunately, or unfortunately, the Anglo-Saxon with his traditions basically founded in the common law of England, has never been able to accept the simple process of the Red Queen. Early there came into his concepts of justice the idea of due process of law and right of the accused to be heard, and to be faced by his accusers. It would have been an easy matter in creating the armies of England or even the Continental Army under General Washington to have endowed each commander with the authority of the Red Queen and there ended the matter. The English and American people could have denied the idea of due process to a man the minute he dressed himself in the uniform of a soldier. Tradition, custom, habit, and the sense of justice prohibited any such course, and as a consequence there was carried over into the military organization at least the traditions, and in most cases the practices of the English common law. It was abhorrent that even a common soldier or sailor should be denied the right to be heard and to present his version of a given transaction. It was easy enough to write on paper rules and regulations which in theory at least protected this right of an accused soldier to be heard; but in practice this modified form of judicial process came into direct conflict with the powers of command exercising disciplinary control. The necessity for command discipline was recognized, just as the American Legion recognizes it today, but difficulties immediately arose in reconciling this power of command with the Anglo-Saxon concept of judicial process. This conflict will probably always remain, as it is inherent in the situation; and the best that Congress and the courts can do is to attempt to ameliorate the sharpness of the conflict. However, unless this conflict is recognized, legislation pertaining to military justice will either circumscribe the powers of command to a point where it becomes an idle gesture, or it will emphasize the powers of command to the injury of the judicial process. The solution of the problem is not easy. Only the correct understanding, on the one hand, of a commander's relationship to his subordinates and his responsibility to them, and on the other hand a comprehension of the subtleties of the judicial process, will produce an approximate reconciliation of the two forces. The American Legion is particularly concerned when any legislation is proposed, that it arrive at a decision as nearly correct as possible.

3. There was a theory extant in the United States for a great number of years that when a man put on the uniform of his country he surrendered certain natural rights. This came about primarily from the volunteer system. When a man volunteered, a contract arose between his government and himself, the contract being called enlistment. It was very easy in the theory to arrive at the conclusion that by this contract the man forswore certain constitutional rights. This was particularly true in view of the fact that the fifth amendment to the Federal Constitution specifically provided that the grand jury could not be dispensed with as a national institution "except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger * * *" With a small Regular Army, it became exceedingly easy for the great body of citizens to consider their soldiers a class apart. The administration of military justice became a very simple matter. Congress having written on the books statutes which in theory preserved certain natural rights of the professional soldier, the administration of these statutes was left entirely to other professional soldiers. The public at large was not concerned, except in some case made prominent in the press, as to whether a professional soldier suffered injustice or not. A review of the records in the office of The Judge Advocate General of the courts martial, both before and after World War I, will convince any fair-minded person that the Army did a fairly good job in its administration of justice, and that there were few cases of injustice. So long as the Army was a professional army, the public could well believe that when a man enlisted he voluntarily, and with his eyes open, chose to forfeit certain rights that he could assert as a civilian. It was pathetically easy to adopt this attitude, because it was not troublesome, and at least gave ease of conscience.

The situation changed quickly, however, when the first selective-service law was written upon the books, because the small professional Army disappeared, and there came into existence an army composed of thousands of nonprofessionals. This presented a problem for the professional soldier. Trained as he was in his ideas of justice, it has been exceedingly difficult for him to adjust his concepts and ideas to the situations arising in a large nonprofessional army. The need for discipline continued, and more probably became more cogent. But a human factor arose which was not within the reckoning of the professional soldier. He was required to adapt the mechanism of the small

professional army to the handling of situations which arose within the ranks of nonprofessional—men who had come from civil life without the least ideas as to the necessity for discipline, and who in fact were rebellious to the idea that they were subject to commands which might mean their deaths. In all fairness, a critic must conclude that the task was fairly well performed, notwithstanding the fact that in World War I many crying cases of injustice were discovered. These cases naturally produced a public clamor for a reformation of military-justice practices, and there resulted the intensive and prolonged investigation by Congress of the disciplinary and military-justice practices of World War I. Resultant upon this investigation came the amendments to the articles of war evidenced by section 1, chapter II, act of June 4, 1920 (41 Stat. 787). These amendments and changes were not the result of hasty or emotional action, but were the deliberate conclusions of Congress reached after months of study and investigation. It was under this new code of 1920 that military justice was administered during the "long armistice" from 1918 to 1941, and it was also under this code that World War II was fought. Out of this trial-and-error method much has been learned, and H. R. 2575, which being enacted into law became title II of the act approved June 24, 1948, shows the result of this experience and the investigation which followed.

The American Legion believes, and here asserts, that with the prospect, which will continue into the indefinite future, of the maintenance of a large nonprofessional Army and Navy, that a reorientation must be attained if our armed forces retain their inherent vigor and strength. It must be frankly recognized by Congress and by the military authorities that for a long time to come our Army will be largely composed of nonprofessional men whose terms of service will be limited. There will of course be found the professional soldier who by deliberate choice has selected the military profession as his vocation. But the vast majority of the personnel will be but temporary soldiers who will, after 2, 3, or 4 years, return to civil life. There must be a constant flow of new men into the services to replace those that leave them. And in order to secure the right type of citizen soldier, whether there be a Selective Service Act or not, there must be positive assurance to him that his rights as a citizen will not be violated when he comes under the disciplinary control of the military. It is asserted that a morale factor enters into this situation, and the American people must be convinced that their sons will receive justice. The military must recognize the sensitivity of public reaction, and it must, to the best of its ability, attempt to reconcile the inherent conflict between the powers of command and the administration of military justice.

There is an extremely human factor in this situation which cannot be ignored. Let Congress write upon the statute books the most perfectly conceived piece of legislation, which insofar as humanly possible will preserve discipline in the armed forces and at the same time protect the individual against tyranny, the fact remains that the execution of these statutes will be by human beings, and in spite of all precautionary arrangements, there will be lapses on given occasions. It was said by the War Department's Advisory Committee that:

"Almost without exception our informants said that the Army system of justice in general and as written in the books, is a good one; that it is excellent in theory and designed to secure swift and sure justice; that the innocent are almost never convicted, and the guilty seldom acquitted. With these conclusions the committee agrees. We were struck by the lack of testimony as to the conviction and punishment of innocent men. This is doubtless true because, speaking in general terms, the system is designed to accord a fair trial. * * *

"The committee noted, however, amongst the constructive critics of the system, a surprising lack of enthusiasm for its operation. On the contrary, there was often a disquieting absence of respect for the operation of the system in its tremendous expansion under the impact of war. There was considerable indignation at some of the current and all too frequent break-downs. The general comment was that the system laid down in the Manual for Courts Martial of the Army was not followed as closely as it should have been, and that the system not infrequently broke down because of two things: (1) A failure on the part of the Army to foresee the needs of its system of military justice and a reluctance to utilize available men of legal skill, so that the courts were frequently staffed with incompetent men; (2) the denial to the courts of independence of action in many instances by the commanding officers who appointed the courts and reviewed their judgment, and who conceived it the duty of the command to interfere for disciplinary purposes."

4. With the presentment to Congress of the Uniform Code of Military Justice (H. R. 2498), the American Legion believes that it is performing its duty, not only toward its own membership, but also toward all veterans, present and future, in presenting its views and criticisms concerning this proposed legislation. The above summary will indicate that the American Legion is not dogmatic in its approach to the problems involved in such legislation, but is endeavoring to find a method of reconciling the differences between the force of the power of command and the processes of justice. It seeks to support the needs of the armed forces for an effective discipline, and it likewise seeks to protect the individual citizen against arbitrary and despotic use of the power of command. It is upon this premise that the following suggestions and criticisms are offered.

III. COMMENTS AND CRITICISMS AS TO SPECIFIC PROVISIONS OF THE PROPOSED UNIFORM CODE OF MILITARY JUSTICE

1. The report of the Special Committee on Military Justice of the Association of the Bar of the City of New York, dated February 27, 1948, criticized H. R. 2575 (80th Cong.) in that it did not effect three certain vital reforms proposed by the War Department's Advisory Committee on Military Justice:

"(*a*) That courts should be appointed by the Judge Advocate General's Department and not, as at present, by the command.

"(*b*) That assigned defense counsel should be a trained lawyer appointed by the Judge Advocate General's Department, and not, as at present, by the commander.

"(*c*) That initial review of decisions of the court (except for clemency) should be placed in the hands of the Judge Advocate General's Department."

The American Bar Association, speaking through its special committee on military justice, as amplified by its chairman, Mr. George A. Spiegelberg, submitted to the subcommittee of the Committee on Armed Service of the House of Representatives the following proposition:

"The remedy suggested is a simple one: the power to convene the court, to appoint assigned defense counsel and to order the sentence executed would be taken from the commanding officer and vested in the Army Judge Advocate General's Department or its equivalent in the other services. Commanding officers who under existing law convene the court would be required to make available to Army or higher headquarters a panel of officers available and qualified for court-martial service. From such panel the Judge Advocate General at Army or higher headquarters (or equivalent echelons in other services) would select the general court to adjudicate the cases in a particular division. That court could, of course, be composed of officers selected entirely from divisions other than the division in which they are assigned to preside. In that way and in that way alone can you have a court composed of officers not subject to the domination of the commander who has directed the trial of a man in his command. The commanding officer would, of course, have the right to add names or to withdraw names from the panel of officers available for court-martial service as required by the needs of his command."

(*a*) The Uniform Code of Military Justice (hereinafter referred to as uniform code) is subject to the first criticism (*a*) above set forth. By article 22 the appointment of the general court will still be made by the command.

This witness is intimately acquainted with the practices, routine, and duties of the office of the Judge Advocate General of the Army. (He does not venture to speak with authority as to the office of the Judge Advocate General of the Navy, but his asseveration pertaining to the office of the Judge Advocate General of the Army applies likewise to the office of the Judge Advocate General of the Air Force.) Even with its limited staff today, the office of the Judge Advocate General of the Army is one of the largest law offices in the world. The supervision of the administration of military justice is but one of its duties. It is charged with the performance of other legal responsibilities of equal importance. Its divisions of contracts, claims, military affairs, and patents and copyrights transact enormous volumes of business each month. It has always been notoriously understaffed, except in days of national emergency or war. The first and most experienced of legal skill is required. The decisions that the Judge Advocate General must make are of enormous importance to the Military Establishment. If this proposal means that the Judge Advocate General of the Army sitting in Washington appoint all of the courts, it will impose upon this corps a duty which is not possible of effective performance. Not only does this condition argue against such plan, but there is the highly practical problem of informing

the Judge Advocate General as to personnel that will be available for the appointment on courts in the Military Establishment, far-flung as it is around the world. In practice, the Judge Advocate General will be compelled to rely upon information furnished him by the commanding officer of the unit for which the court will be appointed. He will be dependent upon information reaching him from the field, as he has no other possible means of learning the identity of the available officers and men. The commanding officer will be required to subordinate other exigencies of service to the demand that he make available at all times certain men for court work. There will be two results from such a system: (1) as a practical matter, the Judge Advocate General will appoint on the courts the same men that the commanding officer would have appointed in the first place; and (2) there will be difficulty in ascertaining the availability of officers and men for a given court at a given time. The eventual result will be that the appointment of the courts will be delayed and will be subject to increased mistake and error. Officers will be appointed who have been transferred from the command after the certified list has been sent by the commanding officer to the Judge Advocate General as to available personnel. Furthermore, should an enlisted defendant demand the presence in the courts of enlisted personnel, the Judge Advocate General would be entirely at the mercy, not only of the commanding officer holding court-martial jurisdiction, but also of subordinate officers of that command.

This witness believes that such change would produce confusion and not attain its objective. The appointment by the Judge Advocate General, sitting in Washington, of a court for General Patton's Third Army after the Saint Lo breakthrough, would have been a ridiculous proposition. General Patton himself had difficulty in finding personnel available for highly necessary courts while he was moving rapidly through France up to the German frontier. How could it be expected that General Cramer, the then Judge Advocate General, would have been able to select a court? A mere statement of such situation is enough to demonstrate the impracticability of the plan. However, Mr. Spiegelberg's statement quoted above definitely outlines an alternative plan in line with the general proposal that the appointment of courts be removed from the command authority. He proposes that general courts be appointed by the Army level from panels of officers submitted by division commanders, and in emergent situations by Army group commanders from panels submitted by Army commanders. The actual selection of the personnel for the courts would be done by the judge advocate of the Army or Army group acting for the Judge Advocate General. Under such arrangement, it would be possible for courts acting for X Division to be composed of officers from Y, Z, and W Divisions, or such court could be officers from X Division itself. It is manifest that the scheme envisions primarily combat organizations, as no mention is made of supply and logistic organizations. Most probably it would likewise be applied to the latter units, but careful statutory draftsmanship will be necessary in order to cover all of the technical situations. Communications Zone (Services of Supply) in the European Theater of Operations was a top logistics command having several bases, each of which was granted by the President general courts-martial jurisdiction. In the functioning of the general courts of the bases, the commanding general of Communications Zone had no function. The records of trial were first reviewed by the commanding general of the base and then by the commanding general of the theater, in death and dismissal cases, with final decision by the board of review. In all other cases the board of review exercised final appellate review powers by automatic appeal from action by commanding general of the base.

The scheme presents admirable features worthy of serious consideration. (If it is practical in the Army, it will be practical in the Air Forces. As to the Navy, this witness expresses no opinion.) It would definitely lessen "command pressure" on the courts and go far in the direction of protecting it from undue influence of command authority. If divorcement of the military justice process from the command power was the only consideration, the plan would be worthy of trial, at least in peacetime. In the opinion of this witness, discipline would not be seriously impaired or injured by this change, and certainly a commanding officer of the division (or corresponding command) would have little opportunity in visiting his displeasure upon court members through efficiency reports or withholding of promotions. There is a close, if not full, approach to the independence of the court in its judicial action. There remains for solution the problem of its practicability in time of war. It is difficult to measure the impact of such system on combat conditions. It is doubtful whether any person, no matter what his experience may be, can give a reliable opinion on this point. It is wholly new and untried. Questions of communication and transportation are involved;

and of more serious import is the question of utilization of manpower. The American Legion will not oppose such plan, but it offers the cautionary advice that before it is adopted, Congress should be reasonably certain it is not creating a mechanism that will prove unworkable or burdensome to the point of impairing efficiency.

Reference should be made to section 5 of S. 1605 (by Mr. Bridges), (pp. 5, 6, 7), whereby a modification of the last-mentioned plan is attempted. There the court is "selected" by the senior officers of the Judge Advocate General's Corps assigned to the command of the convening authority from a panel of officers and men (consisting of twice the number to be chosen for the court) submitted by the convening authority. This method of selection applies equally to general and special courts. This scheme represents no change in present practice. Evidently the draftsman knew little concerning the selection of general courts, because the law would do but little more than place in statutory form the prevailing practice, both under the 1920 code and 1948 code. The staff judge advocate has usually "selected" the courts' personnel. This has been one of his principal and sometimes most onerous duties. The appointing or convening authority acts on his advice or suggestions. Sometimes the chief of staff has approved the court's membership without consulting his commanding general. This proposition means nothing in practice, and the objective of the American Bar Association and American Legion of insulating the court from undue and improper influence of higher authority remains unattained. The present system, regardless of its faults, has the advantage of being direct and honest. The proposal is an idle gesture pretending to be something that clearly it is not.

(*b*) Discussion of criticism (b) supra will be hereinafter contained. (See par. III, 5, infra.)

(*c*) The uniform code perpetuates the practice heretofore existing in the Army of a review of the record of trial by the appointing authority (arts. 60 through 65). A similar practice has prevailed in the Navy, except that no opinion of the legal officer is required. The witness has never understood the reason for the objection to this procedure (assuming, of course, the necessity of authorizing the command to appoint the court). In considering this power, attention is directed to A. W. 47 (d) (f), Manual for Courts Martial, United States Army, 1949. It will there be noted that the reviewing (appointing) authority, in considering the record of the trial and acting upon the sentence, is not authorized to increase the latter. His entire authority points in the direction of either disapproving the sentence and ordering a rehearing, or reducing the quality of the offense and mitigating the punishment. The elimination of this preliminary review by the appointing authority will remove a safeguard for the accused that times without number has been effectively exercised. In addition, the action of the appointing authority on the record is highly informatory to the board of review. Intelligent and experienced commanders have exercised the authority in the old "50½" cases always for the benefit of a defendant. This review can be eliminated without any destruction of the fundamental structure of appellate review; but it is believed that the benefits, both to the accused and to the board of review, are so great that such elimination would be a mistake. Evidently the committee of the Association of the Bar of the City of New York did not fully understand how this power of review had been exercised. The prohibitions against increasing the weight of the sentence, and also against attempting to reverse a finding of "not guilty" safeguard the rights of an accused, and at the same time give him the benefit of this preliminary review, which in hundreds of cases has resulted in a disapproval of the sentence and a refusal of the reviewing authority to order a new trial. The witness has seen dozens of records where the reviewing authority set the accused free after he had been found guilty by a court. The action by the reviewing authority is judicial and executive in nature, and when intelligently exercised, has resulted in the elimination of the automatic appeal to the board of review, with the resultant burden of work. It is suggested that the retention of the practice here discussed is most desirable.

2. Reference has heretofore been made to the recommendations of the War Department's Advisory Committee with respect to checking command control over the military justice process. In the opinion of this witness, this is the vital issue in this proposed legislation. Hereinbefore there has been discussed the conflict existing between the power of command and the military justice process, but no specific recommendations were made as to this matter. The uniform code has virtually repeated the provisions of both the Courts Martial Manuals, 1949, for the Army and the Air Force, with respect to protecting the integrity

of the military courts. Reference is made to article 37 of the uniform code, which is derived from A. W. 88, Manual for Courts Martial, United States Army, 1949. In addition, it prohibits the convening authority from influencing the law officer and counsel. The same manual contains this elaboration of the article:

"A commanding officer may, through his staff judge advocate or otherwise, give general instruction to a court martial which he has appointed, preferably before any cases have been referred to it for trial. Such instruction may relate to the rules of evidence, burden of proof, and presumption of innocence, and may include information as to the state of discipline in the command, as to the prevalence of offenses which have impaired efficiency and discipline, and of command measures which have been taken to prevent offenses. Such instruction may also present the views of the Department of the Army as to what are regarded as appropriate sentences for designated classes of offenses. The commander may not, however, directly or indirectly give instruction to or otherwise unlawfully influence a court as to its future action in a particular case. Commanding officers are expressly forbidden to censure, reprimand, or admonish a court martial, or any member thereof, with respect to its findings, a sentence adjudged by it, or the exercise of any judicial responsibility * * *" (Manual for Courts Martial, 1949, sec. 87 (b), p. 92).

Undoubtedly the violation of this statute by a commanding officer would result theoretically in charges being preferred against him under article 134, the general article, or under article 98, which provides punishment for any person subject to the code, who "knowingly and intentionally fails to enforce or comply with any provision of this code regulating the proceedings before, during, or after trial of an accused;".

In theory these articles certainly provide adequate safeguards against interference with the process of justice, by the command. But the situation must be viewed in a practical light. The preferring of a charge for such violation of law against a division commander would be a most unusual procedure. Considering the relationship of a commander to his subordinate, it could not be expected that an outraged lieutenant or captain, for instance, would file such charges, except in a most extraordinary case. The extrajudicial punishment that could be inflicted upon such accuser by a division commander during the period between the filing of charges and the trial can well be imagined. Deprivation of privileges, the imposition of onerous duties, and the placing of the junior officer in "social Coventry" would be an easy retaliation by the accused division commander. It cannot be expected that any charges would originate among subordinates. They would come from above. Therefore, the value of sections 37 and 92 of the uniform code is the moral restraint they impose upon the command.

After prolonged and careful consideration of this problem, this witness has been able to devise only one plan or scheme to insure the observance of the injunction contained in article 37 by a commanding officer, and it must be admitted that this plan weighs heavier on the moral side than on the practical side. This witness proposes that article 37 be supplemented by a provision which would declare that a violation of the article would constitute a civil offense, indictable in a United States district court, with an appropriate punishment of a fine and imprisonment. Such addition would remove the prosecution of an offending officer into a United States district attorney's office, and it is believed that this threat, if contained in the statute, would be the most effective brake upon unlawful influence of the military judicial process. It is not believed that any serious constitutional question would arise where the offense was committed with the Army in the field in foreign lands, as it would constitute an offense against the processes of justice of the Federal Government, and such an offense may be committed anywhere. It is admitted that the infliction of a civil penalty for a military offense is a departure from American tradition and practice; but on the other hand, it is submitted that Congress has the right to protect the integrity of one of the Federal judicial systems (military) through the mechanism of another Federal judicial system (civil). There is also thereby introduced an effectual system of checks and balances, and it is suggested that it would be a foolish commanding general who would venture a violation of this interdiction, when trial in a civil court and a jail sentence awaited him. The introduction of civil remedies into court-martial practice is not unknown. In England today a private soldier may have an action in the civil court against his commanding officer for such damages as he may have suffered while in the service through the violation of his legal rights by the commanding officer.

Finally, it is believed with the additional penalty prescribed for a violation of article 37, that the interpretation above quoted from the manual is a fair elucidation of the subject. Time and again civil judges in instrucing grand juries have explained to them "the prevalence of offenses" which have existed in the community and have cautioned the juries as to their duty to seek out crime and criminals. No objection has ever been raised against such grand jury instruction. It is also considered that courts martial should receive information as to what the Department of the Army regards as "appropriate sentences for designated offenses." One of the great criticisms made of the military justice system is the inequality of sentences and the disparity of the same. This same condition exists in the Federal courts. The Attorney General annually for years has called attention to this situation. The entire elimination of inequality in sentences is probably not possible, but certainly a declaration by the Department of the Army, properly conveyed to the court, as to appropriate sentences, does not invade the province of the court nor prejudice the rights of a guilty accused.

The boards of review in the Office of the Judge Advocate General, or in a branch office, have always experienced difficulty in determining whether or not the appointing authority exercised unfair influence upon the court. In the European theater of operations a few records came up on appeal which contained information pertaining to the actions of the appointing authority in a given case. The great percentage of the records failed to reveal any undue influence. The boards of review in the European theater of operations in particular, were wholly familiar with the fact that such information, if it existed, would be concealed, either deliberately by the reviewing authority, or more usually as a result of the temerity of defense counsel to present proof of such fact. One of the reforms that may be effected is a statutory requirement that all communications between the appointing authority and the court, and between the court and the appointing authority, before, during, and after a trial, shall become part of the appellate record, and that it shall be the duty of the reviewing authority, the court members, trial counsel, and defense counsel to insert in the record of trial any and all evidence pertaining to the relationship of the appointing authority to the court and his communications to it, with a warning that the omission of such information, when it exists, shall constitute an offense under the code. If this requirement is adopted, the task of appellate tribunals of determining whether undue influence was used on a court will be much easier than heretofore. It is not believed that the provision of article 38–C, uniform code, is sufficiently broad to assure the inclusion in the record of trial of the last above required information.

3. The right of an accused soldier to demand the presence of enlisted personnel on either a general or special court martial first made its appearance in A. W. 4, as amended by H. R. 2575. The uniform code retains this provision, and it is now in operation. The first courts to which were appointed enlisted personnel were convened by Headquarters Command, USAF, at Bolling Air Force Base, District of Columbia, and also by a court-martial jurisdiction in Heidelberg, Germany. Its value is yet to be demonstrated. The special committee on military justice of the Association of the Bar of the City of New York wrote thus:

"There has been considerable discussion concerning the presence of enlisted men on military courts. Your committee believes that the public attention given to this aspect of the bill far outweighs its importance. The presence of enlisted men on courts is of doubtful value to the accused, since, in all likelihood, those appointed would be career soldiers, more severe than officers or their subordinates. If, however, the provision tends to give the enlisted man more confidence in the courts and a greater feeling that justice will be done, we see no objection to the experiment."

The committee above quoted has probably stated the real value of such provision. If the insistence that enlisted men be placed on courts martial is motivated by the idea that the courts would be more lenient, the proponents of the plan will most probably be bitterly disappointed. In the opinion of the witness, the presence of qualified, intelligent enlisted men on the court will not in any respect result in more acquittals or in less onerous sentences. If, on the other hand, the placement of enlisted men on courts is prompted by the desire to strengthen the courts in the eyes of both the public and the enlisted personnel, this change is justified, and it is upon this basis that the American Legion supports such change. The results will be watched with great interest, and it is hoped that such reform will give increased confidence in the military justice system.

Reference is made to section 3 of S. 1605 (by Mr. Bridges) whereby the placement of enlisted personnel on general and special courts martial for trial of enlisted personnel is made mandatory when demanded by an accused, regard-

less of the fact that qualified enlisted personnel are not available. Under H. R. 2575 and the proposed Uniform Code of Military Justice, a court, even after demand of an accused for presence of enlisted personnel on the court, may try him if enlisted personnel are not available because of "physical conditions or military exigencies" which must be certified and explained by the appointing authority. It is submitted the proposal of the uniform code fully protects an accused, and at the same time permits flexibility to care for unusual circumstances. However, there can be no real objection to the proposal of S. 1605, because as a practical matter an appointing authority will always hesitate to refuse to comply with an accused's demand for enlisted members on the court which tries him. I will be a rare and singular case where enlisted personnel will not be made available for a court.

4. The American Legion highly approves article 26, which directs that the law officer of a general court shall be "a member of the bar of the Federal court or the highest court of a State of the United States, and who is certified to be qualified for such duty by the Judge Advocate General of the armed force of which he is a member." This requirement should have been written into the law at the time of the enactment of the 1920 code. It is absurd to believe that a doctor or a merchant or an engineer can act in this capacity. We prefer this provision to that contained in A. W. 8 as amended by H. R. 2575, which authorized "an officer of the Judge Advocate General's Corps" to be appointed a law member, whether or not he was a member of the bar. It is urged that the requirement that a lawyer and only a lawyer fill this position is a great advancement. Furthermore, the provision in article 26 that the law officer shall not consult with the members of the court other than on the form of the findings, except in the presence of the accused, trial counsel, or defense counsel, nor shall he vote with the members of the court, is a reform which the legal profession has long sought. Although this witness, at the time he appeared before the subcommittee of the House Committee on Armed Services, believed that this provision was unobjectionable, he has reconsidered the matter. While recognizing that it is a situation which presents both favorable and unfavorable aspects, he is inclined to believe that the present provisions of law as set forth in A. W. 8 of the 1948 code, which authorize the presence of the law officer in the closed session of the court and allows him to vote upon findings and sentence, constitutes a safeguard for the accused. Without the law officer in the closed session, the lay members of the court would be judge both of the facts and the law. This is a situation which parallels that of juries in justice of the peace courts. It does not make for certainty, as there is always a chance that without counsel and advice a layman fact-finding body will either misconceive the law of a case or misapply it. Looking at the matter from the standpoint of an accused, the presence of the law officer in the closed sessions of the court appears to be an advantage to him.

5. Article 27 of the uniform code, in prescribing the qualifications of trial counsel and defense counsel, does not require that either of these officers be a member of the bar, if he shall be a judge advocate of the Army or Air Force or a law specialist of the Navy or Coast Guard. In this respect, the qualifications are broader than the qualifications for a law officer, who must be a lawyer. Two subsidiary provisions probably assure that there will be no abuse of allowing nonlawyer judge advocates or nonlawyer law specialists to act in this capacity. The first is that he must be certified as competent to perform his duties by the Judge Advocate General of the armed force of which he is a member. The second provides that trial counsel and defense counsel shall be of equal qualification. There is an element in the legal profession which contends that every judge advocate and law specialist should be admitted to practice either in the Federal courts or in one of the State courts. In the great majority of instances this is true. But there is a small number of judge advocates and law specialists who have never been admitted to practice in any court. Granted that these nonlawyer judge advocates and law specialists are qualified men, the fact remains that in the eyes of the legal profession they are laymen. The reason for this liberalizing provision is a practical one, and that is to permit the use of a layman judge advocate or a layman law specialist where otherwise they would be disqualified. It is questionable whether in any unit of a division or larger there will be enough trained lawyers available to act as law officers, trial counsel, and defense counsel, and consequently resort must be had to the layman judge advocate and the laymen law specialist. If there were assurance that in Army, Air Force, and Navy units there would be available trained lawyers at all times to perform these functions, no good reason would exist why a layman judge advocate or a layman law specialist should be permitted to practice before courts martial.

The special committee on military justice of the Association of the Bar of the City of New York, in its (b) object set forth above (see par. III, 1, supra) contends that defense counsel "should be a trained lawyer appointed by the Judge Advocate General's Department, and not, as at present, by the commander." Such perfection of detail is highly desirable, without question, but again the test of practicability must be applied. The difficulty of the Judge Advocate General ascertaining the identity of a "trained lawyer" in a unit located on the other side of the world is obvious. Likewise, he must be selected from a panel made available by the commanding officer. Under such circumstances, nothing would be gained by this change.

6. Articles 30 through 35 of the proposed uniform code, covering pretrial procedure and investigation, when viewed in the light of the recent decision of the Supreme Court of the United States in the case of *Humphrey, Warden United States Penitentiary, Lewisburg* v. *Bernard W. Smith*, decided April 25, 1949, are satisfactory. The uncertainty prevailing prior to the Smith decision concerning the correct interpretation of these pretrial provisions has now been eliminated. The Smith decision definitely holds that the provisions of old article of war 70 of the 1920 code (art. 46, 1948 code) are not jurisdictional, but directional, and that a failure to conduct pretrial investigations as required by A. W. 70 does not deprive a general court martial of jurisdiction so as to empower civil courts in habeas corpus proceedings to invalidate court-martial judgments. The relevant provisions in the Manual for Courts Martial for 1949 (sec. 35, pp. 28–32) were written on the hypothesis that A. W. 70 (1920 code) and A. W. 46 (1948 code) would be interpreted as directional and not mandatory. In other words, the manual foreshadowed the Smith decision. The failure not to conduct a pretrial investigation, as required by the statute, may result in prejudice to the accused. The proposed article 32 of the uniform code eliminates the jurisdictional question, and yet, in the opinion of this witness, it establishes a mode of procedure which will be highly beneficial to the accused. The test prescribed is whether or not the failure to meet the requirements of the pretrial investigation prejudices the accused in his defense. If the attention of the court is invited to violations of these directions, it may grant relief, either through continuation or through requiring additional investigation for the benefit of the accused. It is believed that this solution of the problem is the best yet presented. An accused may, under the proposed statute, have the benefit of counsel at the pretrial investigation, if he desires, and he should be confronted by his accuser and witnesses against him, and should be able to present witnesses in his own behalf. The pretrial procedure should be conducted in such manner as to permit both the prosecution and defense to discover all evidence available, and to make it possible for the free use of the accused as well as the prosecution. The right conferred upon a military suspect for a pretrial investigation is a valuable right. If there is vigorous and good-faith compliance with the directions, the accused will have an opportunity for defense not heretofore possessed by him. If a few investigating officers who are derelict in the performance of their duties are charged and brought to trial under proposed articles 98 of the uniform code for the noncompliance with the provisions of proposed article 30, etc., the desired end will probably be achieved. Here again, however, is the everlasting human factor. The law may be perfect in its mechanism, but its enforcement may be bad. Only education of military personnel in the requirements of law will achieve lasting reforms.

7. Article 44 of the uniform code reads as follows:

"No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court martial upon any charge or specification shall be held to be a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed."

This provision in substance is discovered in A. W. 40 of the 1920 code, and A. W. 40 of the 1949 code. It has been applied literally in several cases, but it was not until the famous case of *Wade* v. *Hunter* that it received its crucial test. The Wade case involves the problem as to whether jeopardy attaches before findings of a court martial. The District Court of the Eastern District of Kansas held on habeas corpus (72 Fed. Supp. 755) that notwithstanding the literal reading of A. W. 40 (art. 44) that jeopardy could attach before findings. The circuit court of appeals reversed this holding (169 Fed. (2d) 973), and Wade was granted certiorari by the Supreme Court. To the great majority of the legal profession who are familiar with this subject, a literal application of A. W. 40 is extremely offensive. The Wade case is one in point. Wade had been charged with the crime

of rape, and went to trial before a divisional court martial. Both the prosecution and the defense rested their case, and the court went into closed session to deliberate. After deliberation, court was opened and the trial judge advocate was requested to produce two certain witnesses who were alleged to know facts concerning the offense. The court then adjourned, subject to call. Subsequent to adjournment of the court, the divisional commander recalled the charges from the court and transmitted them to another jurisdiction, on the assertion that due to tactical conditions the witnesses were not procurable. The receiving jurisdiction in turn transmitted the charges to a third jurisdiction, with the request to bring Wade to trial, on the same charges, because of the proximity of the required witnesses. At the second trial Wade pleaded former jeopardy and placed in evidence the complete record of his first trial. Based on the literal reading of A. W. 40 (proposed art. 44) the third court martial overruled the plea of former jeopardy, holding that until there was an approval by the reviewing authority there was no complete trial. In the opinion of a great many lawyers, article 44 is unconstitutional, and void, because it does not recognize one of the interpreted principles of the fifth amendment, that jeopardy may attach before verdict. The circuit court of appeals in the Wade case refused to adopt a literal reading of this article, and impliedly held that jeopardy may attach before findings (verdict) but in the specific instance, the doctrine of "imperious necessity" intervened, and thereby nullified the first trial. Both the trial court and the circuit court of appeals appear to have been in agreement on the proposition that the fifth amendment is applicable to military justice practice, and that A. W. 40 must be interpreted within the purview of the fifth amendment. The difference between the district court and the circuit court arose primarily on the question of "imperious necessity."

On April 25, 1949, the Supreme Court of the United States released its opinion in the Wade case. Both the majority and dissenting opinions are based upon the premise that the fifth amendment of the Federal Constitution is applicable to the military justice process, and that, therefore, jeopardy may attach to a trial before a court martial, before findings. The majority opinion refuses to adopt the literal reading of article of war 40, 1920 code (art. 44, proposed uniform code), and founds its decision upon the doctrine long ago announced in *United States* v. *Perez* (9 Wheat. 579). The result of this decision is that article 44 of the proposed uniform code must be wholly eliminated in its present form, and the double jeopardy provisions must be stated under the doctrine of the Wade case. The new article must recognize that jeopardy may attach before findings and that the doctrine of "imperious necessity" is now part of the military law. The new article must express the doctrine of the United States Supreme Court that the ancient common-law pleas of autre foi convict and autre foi acquit are supplemented by a form of jeopardy occurring before findings. In the opinion of this witness, the Wade decision is a great victory for that group of military lawyers who long opposed the literal application of old article of war 40. There always existed the temptation for an appointing authority to withdraw a charge when he learned that the prosecution was going to fail in his case. Under the Federal court rule, the failure of a district attorney to have present in court his necessary witnesses is not "imperious necessity" and the same rule should certainly apply in courts martial. However, "imperious necessity" in civil courts must be more limited in meaning than "imperious necessity" in courts martial in the field. A tactical condition preventing the presence of witnesses or the production of other evidence is, according to the Wade decision, an "imperious necessity" where the causation is the battle condition and not the mere failure to produce witnesses for the prosecution. The doctrine which is now the law allows a wide field of discretion, and will not in any respect handicap a court martial in its functions. On the other hand, it does protect an accused against the arbitrary action of an appointing authority in stopping a trial simply because it is apparent that the accused will be acquitted.

8. Article 66 (e) of the uniform code, with reference to action by and practice before boards of review, specifically provides: "Within 10 days after any decision by a board of review, the Judge Advocate General may refer the case for recommendation to the same or another board of review." In the opinion of this witness, there is no objection to the Judge Advocate General returning a decision to a board of review for reconsideration, provided it is the same board of review that passed upon the case originally. But to permit the Judge Advocate General to "shop around" his department and find another board of review which is willing to adopt the Judge Advocate General's view on a given question is wholly destructive of the appellate formula laid down in proposed

article 66 et seq. The underscored words "or another" should be stricken. It is allowing the prosecution to have "two bites at the cherry." If the Judge Advocate General is dissatisfied with the ultimate holding of a board of review, he may send the case to the Judicial Council, but he should not be permitted to seek a board of review that will adopt his ideas. This witness does not believe that the draftsman of this section understood clearly the portent of allowing the Judge Advocate General to send cases to "another board of review" when he is dissatisfied with the decision of one of the boards.

Attention is invited to H. R. 4080, introduced by Mr. Brooks, and particularly to the modified form of said section 66 (e). The objectionable feature above discussed in the proposed uniform code has been eliminated. It is recommended that paragraph 66 (e) as contained in H. R. 4080 be adopted.

9. Article 67 of the uniform code creates the new Judicial Council, and provides that the members thereof shall be appointed by the President from civilian life; that they shall be members of the bar admitted to practice before the Supreme Court of the United States; and each member shall receive compensation and allowances equal to those paid to a judge of the United States court of appeals. This section is defective and must be amended to include a statement of the tenure of office; whether the members thereof shall enjoy the retirement privileges of the judges and justices of the Federal courts; and there should be included a provision that the nominees of the President must receive the approval of the Senate. Subparagraph (a) of article 67 discloses that not enough consideration was given to the composition of this important judicial body. The American Legion strongly recommends that the section be redrafted so as to conform in the main with the provisions of law governing the appointment and tenure of justices of the United States courts of appeals. Further, the present section contains no provisions for replacement of deceased or incapacitated members of the council. In its present condition the section will produce only embarrassment and difficulty.

The creation of this new appellate tribunal, composed of members of the bar of the Supreme Court of the United States, selected from civilian life, is in the opinion of the American Legion, a tremendous advancement in the administration of military justice. However, the name "Judicial Council" is a misnomer. It is not informative, and in no sense discloses the important functions and responsibilities of this body. An opportunity is here afforded the Military Establishment to convince the public that the military justice system, when the contemplated reforms are effected, will be not a mere "drumhead" arrangement, but a true judicial system, and that its courts are judicial organisms and not mere convenient administrative creatures of a commanding officer. It is a notorious fact that only a small number of the personnel engaged in World War II had any accurate knowledge as to the military justice system in its entirety. They encountered only the trial courts, and few, if any, had other than most fragmentary notions as to the appellate processes under the 1920 code. It may be safely stated that the public at large had practically no knowledge of the military justice processes. This witness' contacts with public audiences since his return to inactive duty has been broad and extensive, and from these contacts he is convinced that the average citizen is wholly ignorant of the processes of military justice. Commentators and columnists seeking notoriety, with the ever-present desire to shock the public, found in certain cases source material for their propaganda, and they were almost the exclusive agencies of information as to the administration of discipline and justice in the armed forces. This witness is extremely critical of the War and Navy Departments for their failure to inform the American people as to the actual facts in certain notorious cases, although they possessed the information. Likewise, he is critical of these Departments for their failure to submit to the public for its judgment, their sides of the controversy involving military justice reforms. There has been a particularly lamentable lack of frankness in this regard. It is strongly suggested and urged that this new appellate tribunal be designated as "Military Court of Appeal." The use of this name will have a far-reaching effect upon public opinion, and will in addition give proper dignity to this body. The name "Judicial Council" betokens some administrative unit, and does not indicate that its functions are judicial and that it is in truth a court.

An examination of the reports of the United States Supreme Court for the years 1946, 1947, and 1948, will disclose a tremendous increase in habeas corpus cases arising out of State and Federal court judgments of conviction. The courts martial have contributed their share to this litigation in the United States district courts and circuit courts of appeal. The Judge Advocate General of the Army,

and certain designated members of his staff, and the Department of Justice have devoted much time and effort to the defense of these proceedings. It is the belief of this witness that the creation of this civilian court will largely eliminate these collateral attacks upon court-martial judgments. Upon this ground alone its existence may be fully justified.

Reference is now made to article 67 of H. R. 4080. This draft of the section revises section 67 of the proposed uniform code and eliminates the foregoing objections thereto. It will be noted that definitive provisions have been made for the creation of this high appellate court, and that the court's name is changed to "Court of Military Appeals."

However, section 67 of H. R. 4080 continues to provide in subparagraph ("d") thereof, that "the Court of Military Appeals shall take action only with respect to matters of law." This is the same provision as is contained in subparagraph ("d") of article 67 of the proposed uniform code (p. 857). In the opinion of this witness, this limitation upon the reviewing power of this high court is a serious mistake. In his opinion it should be empowered to judge of the credibility of witnesses, weigh the evidence, and make its own findings, if necessary. In the legal profession there has always existed great dissatisfaction with the limited power of the circuit court of appeals in criminal cases, which refuses to disturb a verdict if there is substantial evidence to support it. In view of the fact that this proposed legislation is curative in nature, it is submitted that the expansion of the authority of the Military Court of Appeals over facts will be a most important element of the proposed reforms. It is urged that the last sentence of article 67 (d) of the proposed uniform code be stricken and that in lieu thereof there be substituted the following: "In considering the record of trial, the Court of Military Appeals shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

10. Article 73, uniform code, authorizes the granting of a new trial by the Judge Advocate General within 1 year after the approval by the convening authority, of court-martial sentences which extend to death, dismissal, dishonorable or bad-conduct discharge, or confinement for 1 year. There is an evident attempt to confine this power to narrower limits than that granted by A. W. 53 of the 1949 code. It is submitted that A. W. 53 could well be adopted in toto, with such changes as are necessary to meet the relationship of the article to other provisions of the uniform code, instead of using the form as proposed. There is no quarrel with the idea supporting the plan to grant an accused additional relief. A first objection to article 73 is the fact that the Judge Advocate General may grant a new trial only on grounds of newly discovered evidence or fraud on the court, while in A. W. 53 the Judge Advocate General's authority is much broader, because he may grant relief in his discretion "upon good cause shown." This witness's experience in cases arising after the final appellate review taught him that there are circumstances which justify relief of the nature contemplated by A. W. 53, but which are not in the nature of either newly discovered evidence of fraud upon the court. As an example, a certain soldier with an unusually fine battle record did not receive proper consideration of same by the court which adjudged the sentence. Facts were brought to the attention of the Judge Advocate General which justified a remission of the greater part of this man's sentence, and yet this evidence was not of a nature as to constitute newly discovered evidence, or fraud. Frankly, the proposed statute is one intended to empower the Judge Advocate General to do justice in a certain number of cases, and in the opinion of this witness, he should not be limited in granting this relief to the narrow grounds of newly discovered evidence or fraud upon the court. In many cases the granting of a new trial does not remedy the injustice. The Judge Advocate General should be empowered also to "vacate a sentence, restore rights, privileges, and property affected by said sentence, and substitute for dismissal, dishonorable discharge, or bad-conduct discharge previously executed, a form of discharge authorized for administrative issuance." It is manifest that the draftsman intended to take this latter power from the Judge Advocate General and confer it under article 74 exclusively upon the Secretary of the Department or any Under Secretary or Assistant Secretary or commanding officer designated by the Secretary. This raises a question which became vital at the time H. R. 2575 was considered by congressional committees. There was a deliberate attempt by certain elements of the General Staff to deprive the Judge Advocate General of all possible authority and to make him a mere subordinate of the Secretary of the Department. Eventually Congress adopted A. W. 53 in its present form, and in the opinion of this witness it should be so continued.

11. Article 140 of the proposed uniform code authorizes the President to delegate any authority vested in him under this code, and to provide for the subdelegation of such authority. In the opinion of this witness, the draftsman of this provision misconceived entirely the authority contained in title I of Public Law 759 dealing with selective service. This authority is not contained within title II of the act (the Kem amendment) which created the 1948 Code of Military Justice. This error is perpetuated in article 140 of H. R. 4080. It is submitted that this provision is particularly dangerous in its subdelegation aspect. Any person who has had experience with the executive branch of government under the First and Second War Power Acts understands clearly the dangers involved in the subdelegation of authority. The President may well be authorized to delegate his authority to the Secretary of Defense, or to the Secretaries of the Army, Navy, and Air Force, except as to those sentence which involve death or dismissal of officers. Authority to act in these two specific classes of cases should be imposed upon the President, and retained by him. The subdelegation clause should be entirely eliminated, and the delegation of authority by the President should be limited to the Secretary of Defense and the three Department Secretaries of the armed services.

Sitting with me this morning is an old law partner of mine, he is a young man, but we were in the practice of law in Chattanooga together; he is Mr. Jack Chambliss, who was an officer in the Navy, after being a midshipman—an apprentice seaman, and if he wants to make any suggestions or ask any questions, the Chair will permit him to do so, and will be very glad for him to do so.

General Taylor, will you introduce your next witness?

General TAYLOR. Yes. I have, Mr. Chairman, Mr. John Finn, who is the judge advocate of the department of the District of Columbia; was in the Navy during the entire war, and has had somewhat the same experience which General Riter has had.

The last 4 months of his service he spent as recorder and a member of the Ballantine Board, set up by Secretary of the Navy Forrestal, to review and consider revision of the Articles for the Government of the Navy and providing officers to perform duties and related matters. Mr. Finn.

Senator KEFAUVER. The committee is glad to have you. I have looked over your statement before the House committee, and if you have a similar statement, we would be glad if you would file it at this point in the record.

## STATEMENT OF JOHN J. FINN, JUDGE ADVOCATE, DEPARTMENT OF THE DISTRICT OF COLUMBIA, THE AMERICAN LEGION

Mr. FINN. Since, Mr. Chairman, you have considered and are considering now, as I understand it, S. 857, and since that is identical with 2498, which I discussed previously——

Senator KEFAUVER. Yes.

Mr. FINN. I think that I would like to submit my original statement to the House again here to this committee.

Senator KEFAUVER. It will be placed in the record at this point.

(The document referred to follows:)

STATEMENT OF JOHN J. FINN, JUDGE ADVOCATE, DISTRICT OF COLUMBIA DEPARTMENT OF THE AMERICAN LEGION

### I. INTRODUCTION OF WITNESS

The witness appears on behalf of the American Legion.

The witness was graduated from Northeastern University, School of Law. He was admitted to the Massachusetts bar in 1929 and was actively engaged in

the practice of law in the city of Boston from that time until entry into the Navy in October of 1943. His practice was almost entirely devoted to trial and appellate work defending negligence and contract cases for insurance companies and others with a substantial experience in the defense of criminal cases.

Upon entering the service the witness was commissioned a lieutenant (junior grade) and assigned to the Office of the Judge Advocate General at Washington where he served for approximately 33 months in the review of general court-martial cases. For approximately 3 months of that time he served on the Board of Review set up in the Judge Advocate General's office near the end of the war. The last 4 months of his service were spent as recorder and members of the Ballantine Board set up by the then Secretary of the Navy, Mr. Forrestal, to review and consider revision of the Articles for the Government of the Navy, the providing of officers to perform law duties and related matters.

The witness also assisted Judge McGuire and his committee in its inquiries which led to the conclusions set out in the report of that committee on, relatively, the same subject.

The witness is a member of the Massachusetts Law Society, the American Bar Association, the Federal Bar of Massachusetts, the bar of the United States Court of Claims and of the United States Supreme Court. He is a member of the Reserve Officers' Association of the United States. He is presently the judge advocate of the District of Columbia Department of the American Legion.

### II. GENERAL COMMENT

I expect to confine my remarks to three main categories: (1) Personnel concerned with legal duties in the Navy; (2) jurisdiction of naval courts; (3) review of cases—all of this in connection with H. R. 2498, the bill here under discussion.

The present bill is an admirable step forward insofar as military and naval justice is concerned. As will be noted in the commentary of the draftsmen of the bill, much that is contained in the bill is new to the Navy and represents improvements which many have thought long necessary and overdue. The format of the proposed legislation is also very fine and presents a readable, coherent, and readily understandable code which will enable those who are compelled to work with it, if passed, to accomplish their tasks with greater assurance and dispatch than has been the case in the past.

Furthermore, the purpose of the proposed legislation carries out the ideas of the American Legion in putting into one code the law applicable to all the armed services.

No better illustration of the need for such a code can be furnished than the case of *United States ex rel Hirshberg* v. *Cooke*, decided by the United States Supreme Court February 28, 1949 (17 U. S. Law Wk. 4223).

I have attached to this statement, by way of an appendix, some of the objections which the Legion entertains to the passage of the bill in its present form. Some of these are in addition to those mentioned by Commander Riter.

My comments regarding the bill are furnished from the standpoint of one who has had to work with the Articles for the Government of the Navy, as presently constituted, as a reviewing officer of court-martial cases.

I am mindful of the fact that the purpose of our Military Establishment is to be prepared for war and, if it comes, to fight it efficiently and successfully. To accomplish such a purpose the commanding officers must have discipline and a means of enforcing order. You can't have a debating society holding forth in battle or when a ship is under way.

The question is: Can discipline be enforced without thwarting justice as the American people have some to know the term? It is believed that this can be done and that the present bill goes much further toward accomplishing this objective than has been the case in the past.

The present Articles for the Government of the Navy were adopted, in the main, in 1862 (34 U. S. C., secs. 1200 et seq.). There have been minor changes in the articles since that time, but none of any significance. Thus, it will be seen that the situation is substantially different than that prevailing in the Army where great reforms have been effected as late as 1948 (Public Law 759, 80th Cong.).

The Navy has not been subjected to the volume of criticism that has been the lot of the Army for three reasons, in the opinion of this witness. First, it is a smaller and more compact organization; second, because of smaller size it could be more efficiently administered from the legal standpoint; and third,

its powers to execute, discharge, and dismiss offenders were not as broad as those granted to the Army.

The American Legion invites attention to a resolution adopted by the national executive committee at its meeting in Indianapolis, Ind., May 3, 4, and 5, 1948. The resolution reads as follows:

"Whereas there has been effected a merger of the armed services; and

"Whereas under the system of military law and justice presently existing and immediately contemplated, there are or will be a Judge Advocate General in each of the Army, Navy, and Air Force; and

"Whereas the American Legion, interested not only in the economical but also adequate and capable administration and disposition of legal matters, sees no reason for the maintenance of three separate legal systems in the armed forces: Now, therefore, be it

"*Resolved*, That the Congress of the United States before enacting legislation presently pending in bills presented by the Army revising the Articles of War and by the Navy revising the Articles for the Government of the Navy be called upon to instigate an investigation of the present system to the end that more equitable and just disposition of courts-martial cases be had; that past injustices in the said system may be remedied; that the preferential treatment of officers of the Regular services over officers in the Reserves in the matter of retirement benefits may be abolished; that preferential treatment of officers over enlisted personnel in regard to courts martial be abolished;

"That the boards for the review of discharges and dismissals set up under the GI bill and the boards for the correction of military records for the review of discharges and dismissals set up under the GI bill and the boards for the correction of military records set up under the Reorganization Act (Public Law 601, 79th Cong., sec. 207) be made to act in accordance with the will of Congress and the people; and

"That consolidation of all legal offices of the armed forces may be effected and in the future be carried out under one head."

The position of the American Legion with regard to control of legal functions is adequately set out in the foregoing resolution. It is presented here and now for the consideration of Congress.

It will be noted that in England there has been a merger of the Air Force and Army Judge Advocate Generals' offices. A civilian has been put in charge. Due to the recent enactment of the legislation which effects this change, the Legion has been unable to look into the matter as deeply as it would like, but refers Congress and this committee to the London Letter in the American Bar Association Journal, page 75, in the January 1949 edition. The following statement appears therein:

"The position of the Judge Advocate General and the organization of his department has been under consideration for some time. The Secretary of State for War, Mr. Shinwell, stated on September 21 in the House of Commons that the judge advocate will, in the future, be appointed on the recommendation of and be responsible to the Lord Chancellor, instead of the Secretaries of State for War and Air. The responsibility for acting or not acting on the Judge Advocate General's advice in particular cases will remain with the Secretary of State concerned.

"The Judge Advocate General's Department will be reconstituted so as to separate the functions of pretrial advice and prosecution from functions of a judicial character. The former functions will be transferred to directorates in the departments of the Secretaries of State for War and Air.

"The Judge Advocate General will also cease to be responsible for the collection of evidence against, and the prosecution of, war criminals. These duties will be carried out in the directorate of the War Office to which the Judge Advocate General's existing military department has been transferred.

"The reorganization took place on October 1, 1948, and a statement showing what are now the main functions of the Judge Advocate General has been circulated. He is to superintend the administration of military and air force law in the Army and Air Force respectively, including the provisions of deputies and legal staffs with the principal Army and Air Force commands abroad; provide and appoint judge advocates at trials by court martial and military courts held in the United Kingdom and abroad; review the proceedings of courts martial and of military courts held pursuant to Royal Warrant (prisoner of war and war criminals), including the tendering of legal advice on confirmation, review or petition. In the event of its being necessary to quash the proceedings he will make recommendations to the appropriate Secretary of State or commander in

chief with this object. He will have custody of the proceedings of all courts martial and military courts, and will give assistance to each Secretary of State in the formulation of any advice it may be necessary to give regarding the proceedings of courts martial and military courts for the trial of prisoners of war. In his capacity as legal adviser to the Secretaries of State for War and Air, he will advise them on general legal questions affecting the Army and Royal Air Force."

The remainder of the remarks furnished herewith are made without contemplation of this suggestion, but are based upon the code as proposed in H. R. 2498.

III. PERSONNEL

No code can be drawn which will eliminate all abuses. You cannot legislate changes in human nature.

Unlike the Army, the Navy has not now, and never has had, a corps of lawyers. Until the recent war it possessed a very small group of officers who were regular line officers, but who had been sent to law schools. Some of these men were admitted to the bar of various States. Some, if not most, never were admitted to any bar. Of all the Judge Advocates General of the Navy, no more than 2, or possibly 3, have been lawyers admitted to practice before the bar of a State of the Union after taking a bar examination. This group was augmented by the use of a few civilians.

During the last war this cadre of legally trained officers served mainly in combat or at sea and not in legal capacities. Most legal billets were filled by Reserve officers called for the purpose, or by retired officers who had had some legal training.

After the conclusion of the war and because of the experiences of the war, the Navy, being cognizant of the vital need for the services of lawyers, accepted many Reserve lawyers into the Regular Navy.

All these lawyers are now known as "legal specialists." They are officers of the line. Under the present system it is believed that an officer of this classification cannot attain to the position of Judge Advocate General of the Navy unless he has had experience at sea and in command functions.

A line officer who cannot take command of a ship should not expect to progress rapidly or very far if he is competing with officers who have such qualifications.

Hitherto the practice was to send officers to sea for a tour of duty after their legal training. After that tour was completed, they returned to legal duties for a tour in that capacity. This rotating system, in practice, afforded a man an opportunity to do legal work about every other 3-year period of his career.

As a result of the present system, at the start of the last war there was a necessity to create the Office of the General Counsel of the Office of the Under Secretary of the Navy. This Office took over all contract and legal procurement functions of the Judge Advocate General's office. This Office still functions. In effect, it creates two offices to carry on the legal work of the Navy. Justification for creation of the Office of the General Counsel and its continuance lies in the fact that sufficiently able and qualified lawyers have not been and apparently are not now available in the Office of the Judge Advocate General to carry on the legal business of the Navy.

In the highly complex field of law it is the belief of this witness that only one who devotes his full time to the law can hope to compete on an equal basis with other legal practitioners.

The system presently in vogue is not changed in the proposed code. Apparently it is anticipated that it will be continued. It is earnestly hoped that the Congress will set up in the Navy a system similar to the Judge Advocate General's Corps in the Army. Such a system at least insures that lawyers will do lawyers' work. It will have the further advantage of enabling lawyers, to some extent, to be promoted on their ability as lawyers. They will work as lawyers at all times during their naval career and thus furnish the Navy with a type of lawyer qualified to cope with those outside the service and with whom they must deal in carrying out their naval duties.

Such a system will have the further advantage, in time, of placing all the legal activities of the Navy under one head, instead of two as is now the case. There will be no divided responsibility, and in all probability great economies can be effected as well as greater efficiency promoted.

The big business in which the Navy is engaged requires the acquisition and use of the best legal brains available. Unless possessors of such qualities can hope to rise to the top there is no incentive offered them to enter or remain in the Navy.

IV. JURISDICTION

The American Legion calls attention to the expanded jurisdiction conferred upon military courts in the proposed code. It may be that such is necessary. If atomic warfare comes, there is the distinct probability that within a few hours after the commencement of hostilities all activities in America would be subject to martial or military law. All people would then become subject to the proposed or a similar code. At least military commissions would take the place of civil courts.

There has been of late a seemingly increasing inclination to widen the jurisdiction of military authority. In the past, Congress has zealously guarded the distinction between the civilian and the military indicated as essential by the writers of the Constitution.

The military has not always been content to remain within constitutional or statutory limits in this regard. Witness the cases of *Duncan* v. *Kahanamoku* (327 U. S. 304), *United States ex rel Hirshberg* v. *Cooke* (17 U. S. Law Wk. 4223), *Rosborough* v. *Rossell* (150 F. 2d 809).

The American Legion is certain that the majority of those in the military and naval service intend to carry out their assigned tasks with the American spirit in mind and within limits imposed by statute and the Constitution. However, wherever an authority is granted there will always be some who will take advantage thereof and abuse it; some through ignorance, and a smaller number through arbitrary willfulness.

With this in mind, it is the position of the Legion that the proposals in H. R. 2498 in regard to jurisdiction should undergo the close scrutiny of all concerned before passage.

It may be that with its better facilities for obtaining information, because of world conditions, and possible defects in the present codes, the Congress will believe it proper to enlarge the jurisdiction as proposed or confer it to a greater extent.

In order to provide for temporary situations, and to correct the present codes, however, we should not surrender so much of our liberties that our form of government may or will be endangered.

If Congress, in its wisdom, decides it is necessary to widen jurisdiction, it is believed that professionally trained lawyers should administer the code. There is an almost vital necessity to provide an adequate and fool-proof system of review. If jurisdiction is to be enlarged, it behooves us to enlarge the powers of the boards that are to review the actions of military courts and not to so circumscribe the activities of such boards that they are or can be rendered impotent in time of emergency or hysteria.

V. REVIEW

The review procedures in the proposed bill are a long advance. It will be noted from the comments of the draftsmen that many of the procedures set up in this respect are entirely new to the Navy.

The articles for the government of the Navy make no provision for boards of review. Late in World War II there was set up in the Office of the Judge Advocate General one such board. Its functions were to review such cases, with a few exceptions, which the officers charged with the duty of primary review in said office were convinced should be set aside. Said board rarely handled a case which had been passed as legal.

When court-martial cases arrived in the Office of the Judge Advocate General each was read by a single officer. If he passed it, the case was sent to the Bureau of Personnel for action on the sentence. No other legal review was had. On the other hand, should such officer determine the conviction was improper and seek to set it aside, the case was then reviewed by each of his superiors. If any superior disagreed, the case was passed as legal—sometimes, when passed by an intermediate superior of the first officer, the Judge Advocate General never saw the case. What officer whose fitness reports were to be marked by the intermediate officer would have the temerity to go over his head and appeal to the Judge Advocate General?

Under the system then, and even now, in vogue the officer who found or finds errors of law in a number of cases caused and causes a slow-down in the work turned out. A commanding officer, anxious to make a record for production, is not fully appreciative of the work of one who, because of his belief that legal violations have occurred, insists on writing an opinion. Such a reviewing officer, who in private life might be commended for his meticulous care and devotion to

duty, might not receive as satisfactory a fitness report as one who, because of laziness, negligence, or ignorance passes a case without writing an opinion.

In this connection it is believed that some figures which are to be found in the minority report of the Ballantine Board appointed by the Secretary of the Navy, which reported to the Secretary of the Navy on April 24, 1946, will be of interest to the committee.

*Figures*

In fiscal year 1945, 27,861 general courts-martial cases were received in the Office of the Judge Advocate General of the Navy. Only 60 of these cases were set aside en toto (0.21 percent) by that office; 69 more were set aside en toto by convening authorities (0.24 percent). Thus, in the entire Navy, 129 cases, or 0.4 percent, of general courts-martial trials were set aside en toto. The total number of cases resulting in acquittals, reversals, nolle prosequi, and in which pleas in bar were sustained, were 682, or 0.2 percent.

The Annual Report of the Director of the Administrative Office of United States Courts for 1945 under the report of the Judicial Conference of Senior Circuit Judges indicates that 41,653 defendants were indicted in the year 1945. Of these 34,117 were convicted, and 7,536, or 18 percent, were not convicted. Of this 7,536, 6,369 were dismissed and 1,167 acquitted. The same report shows that in appeals in criminal cases in Federal courts, 18.6 percent of the convictions considered in 1945 were reversed.

In short, these figures show that naval courts, composed of legally inexperienced personnel, in considering cases handled by men, also generally inexperienced or improperly chosen for their duties, freed only 1.9 percent of the accused brought before them, as compared to the 18 percent in Federal courts, presided over by lifetime judges considering cases presented by professional lawyers, a ratio of 10 to 1.

In reviews by convening authorities and the Judge Advocate General's office, 0.4 percent of general courts-martial cases were set aside en toto. This must be contrasted with the 18 6 percent of cases set aside by the Federal courts, a ratio of 46½ to 1. If we assume for the sake of argument that 90 percent of the Navy cases were either pleas of guilty or cases where an appeal ordinarily would not be taken, and use only the remaining 10 percent, on the basis of review we find the ratio is still 4½ to 1.

Today the situation has been somewhat improved by the use of "panels" for the review of certain cases. The panels, however, are far removed from the Judge Advocate General, and the possibility of one man overruling the work and views of several still remains. Their use has no legal sanction in that they are not required by law and could be abolished if a Judge Advocate General desired to take such action.

Such a system should not exist, and an attempt is made to eliminate it by the proposed code.

It is the belief of the American Legion that the dangers presently and formerly existing have not been effectively prevented in H. R. 2498. The possibility that, in time of emergency, or manpower shortages, real or imagined, the former practices will be reestablished should be effectually barred.

Former Chief Justice and President Taft once said when discussing civilian courts: "It is not only important that justice be done; it is equally important that the public believe that justice is being done."

The people in America have the idea that the military establishments are controlled by civilians. The Commander in Chief and the heads of our defense, military and naval departments are civilians. When our youth is drafted into the service, it is a board consisting of civilians which determines the fact.

However, in case of those who get into trouble in the armed services, there is no effective civilian control over the type of release the alleged wrong-doer receives.

A man may receive an administrative, bad-conduct, or dishonorable discharge. It is the belief of the American Legion that all such severances from the service should not be effected until a board of civilians has passed upon them.

Many military men have no conception of the effect of one of these discharges. The witness has heard a marine colonel state that a bad conduct discharge was no more serious than would be the case if a boy after working for some time for an employer, was refused a letter of recommendation upon leaving his job.

We know such is not the case. Many boys have been denied the opportunity to go to school, find employment, and enjoy life as others do for an indiscretion committed in the military or naval service, as a result of which they received discharges other than honorable or under honorable conditions.

Generally in civilian life, when one has been convicted and serves his sentence, he has been deemed to have paid his debt to society. The stigma of a bad conduct, or dishonorable, and some types of administrative discharge follows a boy through life. Such discharges, etc., should only be given if thoroughly deserved.

A review by an officer whose promotion, even career, depends upon his relations to and with his superior officers cannot, in the nature of things, be that type of impartial review which should be afforded to maintain the confidence of the American people that when their boys are drafted or otherwise enter into military or naval service, they will get a fair deal.

When a case gets to the review stage the question of the deterrent effect of the sentence upon them, tempted to commit the same acts and the consequent aid and assistance to the maintenance of discipline, is absent. Generally, at least insofar as the Navy was concerned in the last war, the review takes place months after the conclusion of the trial, and the shipmates of the offender have shipped out or are far removed from the place where the offense took place.

Thus it cannot be successfully and convincingly argued that a proper civilian review would handcuff the command in enforcing discipline.

My comments, in the appendix below, relative to the proposed article 67, are applicable here.

"ART. 67. Review by the Judicial Council.

"(a) There is hereby established in the National Military Establishment a Judicial Council. The Judicial Council shall be composed of not less than 3 members. Each member of the Judicial Council shall be appointed by the President from civilian life and shall be a member of the bar admitted to practice before the Supreme Court of the United States, and each member shall receive compensation and allowances equal to those paid to a judge of a United States Court of Appeals.

"(b) Under rules of procedure which it shall prescribe, the Judicial Council shall review the record in the following cases:

"(1) all cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;

"(2) all cases reviewed by a board of review which the Judge Advocate General orders forwarded to the Judicial Council for review; and

"(3) all cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Judicial Council has granted a review.

"(c) The accused shall have 30 days from the time he is notified of the decision of a board of review to petition the Judicial Council for a grant of review. The Judicial Council shall act upon such a petition within 15 days of the receipt thereof.

"(d) In any case reviewed by it, the Judicial Council shall act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review. In a case which the Judge Advocate General orders forwarded to the Judicial Council, such action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, such action need be taken only with respect to issues specified in the grant of review. The Judicial Council shall take action only with respect to matters of law.

"(e) If the Judicial Council sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. Otherwise it shall order that the charges be dismissed.

"(f) After it has acted on a case, the Judicial Council may direct the Judge Advocate General to return the record to the board of review for further review in accordance with the decision of the Judicial Council. Otherwise, unless there is to be further action by the President, or the Secretary of the Department, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the Judicial Council has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

"(g) The Judicial Council and the Judge Advocates General of the armed forces shall meet annually to make a comprehensive survey of the operation of this code and report to the Secretary of Defense and the Secretaries of the Departments any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate."

Review by such a group would have a deterrent effect on some commanders. If it is contemplated that wider jurisdiction is to be granted to the armed services, the power and authority of this Council intended to be set up should be substantially broadened from that given it in the proposed code.

VI. APPENDIX

Discussion here will be confined, in the main, to matters not touched upon in the statement made by Commander Riter. An attempt will be made to discuss the various articles in their numerical order and as they appear in the proposed code.

Article II, section 1, indicates that persons are subject to the code who are called, etc. "* * * to duty in or for training in, the armed forces, from the dates they are required by the terms of the call, draft, or order to obey the same; * * *"

Instead of making this code consistent with section 12 of Public Law 759, it is believed this section nullified the latter act.

It is not believed that, until a person is actually sworn into the armed forces, a military court should have any jurisdiction over him for offenses which it is believed this clause is attempting to anticipate and provide for. Until a person is actually inducted into the armed forces, he remains a civilian, and he should be tried, if he has committed an offense, by civilian courts. During the past war, the civil courts handled this type of situation adequately.

Article II, section 3, provides that Reserve personnel who are voluntarily on inactive-duty training authorized by written orders are to be subject to the code.

Without further implementation and clarification it is believed that this section as worded is far too broad to accomplish what is apparently in the mind of the draftsman. There is no question but what persons in the Reserve who are using expensive equipment of the armed forces should be subject to such a code for offenses arising out of the use of, or while they are using, the said equipment. As written, the clause allows too great latitude and creates too much uncertainty to be allowed to stand.

Article II, sections 11 and 12, indicate additional persons, mostly civilians, who are to be held subject to the code.

It is realized that presently the armed forces have the power to court martial some of these individuals. It is the position of the American Legion that broadening the jurisdiction to try civilians, as is attempted here, should be very charily extended. If the Congress believes that the armed forces should be allowed to try these people under such a code, the American Legion would not raise too strenuous an object. We believe, however, that any such right should be closely restricted and circumspectly granted.

"ART. III (a). Jurisdiction to try certain personnel.

"Reserve personnel of the armed forces who are changed with having committed, while in a status in which they are subject to this code, any offense against this code may be retained in such status, or whether or not such status has terminated, placed in an active-duty status for disciplinary action, without their consent, but not for a longer period of time than may be required for such action."

It is suggested that this section should have a definite time limit inserted for the reason that, as drawn, it creates the possibility of persons being confined without trial for substantial periods of time.

"ART. IV (b). If the President fails to convene a general court-martial within 6 months from the presentation of an application for trial under this article, the secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issuance."

This section as written provides too great latitude and should be furnished with additional safeguards in order that, if a court martial is asked for, it can be had. As written, should the application become lost or pigeonholed and never reach the President within the 6-month period allowed, the service involved could administratively discharge the officer.

In general, with respect to all dismissals not only with regard to officers, but also as to enlisted men, it is the position of the American Legion that at the very least, if there is necessity to administratively discharge and a man is to be discharged administratively, he should be given a hearing before some board set up for the purpose. We have not been furnished with figures, but complaints which have come to our attention indicate that literally thousands of persons received administrative discharges from the armed forces during the last war.

Many of these allegedly received no hearing before any type of tribunal, board, or court.

It is not believed that many officers have a true conception of what ultimate effect this type of severance from the armed services has upon the future of the person dismissed. Any severance from the service, other than an honorable discharge or similar action, has deprived boys of the opportunity to go to college, to obtain employment, and generally has created situations which, in many instances, have been grossly unfair. Certainly such procedure is not in accord with American principles of justice.

Article 15 (b) provides that the Secretary of a Department may, by regulation, limit the powers granted under this section generally.

Section (c) provides that the Secretary of the Department may, by regulation, specifically prescribe the punishments authorized by the section.

It is believed that the powers and punishments should be subject to the regulation of the President or at least the Secretary of National Defense. One of the complaints leveled at the armed services was the wide disparity in punishments, even in different commands of the same service. Passage of these sections will not remedy but certainly create additional basis for complaint. If the powers and punishments indicated in this article emanate from one source, such action will insure uniformity of punishment for the same type of offense and a uniform exercise of powers throughout the armed services.

Article 15 (d) provides for an appeal through proper channels, but indicates the person may be required to serve the punishment adjudged in the meantime. In practice, it is believed that this section will prove to be a nullity. Possibly it will serve to clear the record of an individual, however.

Articles 22 through 29 discuss the appointment and composition of courts martial.

It is greatly feared that the matter which has caused the greatest amount of discussion since the close of the last war; namely, control by command over the functions of the courts, has not been remedied by the proposed sections. This aspect is emphasized by article 27, wherein it is provided that for each general and special court martial the convening authority shall appoint trial and offense counsel, etc. It is impossible for me to conceive that a person represented by designated counsel, from the staff of the command which has determined he is to be tried, will be held to have received the vigorous defense which the American system has indicated one can expect in our courts. Even if the person is most vigorously defended, such a set-up is suspected and, even under the most enlightened administration, if a conviction ensues, criticism will always follow.

The question of availability exists. See comment under article 38 on this point.

Article 29 provides for absent and additional members. The procedures suggested in paragraphs (b) and (c) of said article, for appointment of additional members after the absence of certain members is not conducive to confidence that the conviction, if any, handed down by such a court would be correct. It is the position of the American Legion that once trial has started before a court, if, for any reason, absences among the membership accrue, the remaining members of the court should proceed to a finding. Provision can always be made in regard to general courts martial for having sufficient members appointed to the court to take care of the possibility that a member may not be able to fulfill his duties.

Article 34 (b) reads as follows:

"If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence may be made."

Without additional clarification this clause as it stands is objectionable. If the intent is to allow changes in the charges and specifications if clerical and typographical errors appear, there would be no objection to this section, except that it probably would be simpler to state that that type of error is contemplated and is to be corrected. However, when power is given as it apparently is herein to make changes in the charges and specifications to make them conform to the evidence, it is felt that such power in the hands of unscrupulous persons can lead to great abuses and certainly it is not believed that the committee would authorize a law of this nature. Placing curbs on this power in a manual is not a sufficient guaranty against abuses. The curbs should be specifically set out in the code.

Article 37, which deals with unlawfully influencing the action of the court, has been dealt with at length by Commander Riter. In addition to the comment made by him, with which this witness agrees, it is noted that no penalty for violation of this article is set out in the article itself. The notes indicate that article 98 makes violation an offense. It probably would be more effective to indicate in the article itself that it is an offense.

In article 38 (b) it is provided that an accused shall have the right to be represented in his defense among others by military counsel of his own selection if reasonably available.

The provision of reasonable availability has been the cause of most of the criticism which has come to the attention of this witness with relation to the furnishing of counsel by the command to a defendant. If counsel has been reasonably successful in defending culprits, his availability ceases, or, in some instances, he has been made what is in this code called trial counsel, and thus obviously has been unavailable to defend cases. It is believed that some effort should be made if humanly possible to remove this restriction not only in respect to this section but wherever it appears in other sections and articles of the code.

Article 43 deals with the statute of limitations. Section (f) (3), if it is intended to be confined to military personnel in its application, is probably proper; but if it is intended by this means to enlarge the jurisdiction to make civilians responsible or to acquire jurisdiction over them, it is not believed that the section has any place in a military code of this nature.

Article 44 (d) deals with former jeopardy. In addition to what has been said by Commander Riter, the question arises as to what happens if a finding of "not guilty" is entered. The article, as written, deals only with findings of guilty. In the opinion of this witness, this section, after the first semicolon in line 23, on page 37, should be stricken.

Article 48 deals with contempt. While it is believed that a court of the type indicated or a commission should have the power to punish military personnel guilty of contempts, this section is so broad that it gives latitude for abuse. If counsel who is a civilian appears before such court or commission, he can arbitrarily be held in contempt. It is believed that a more satisfactory section, at least in regard to civilians, could be drawn if certification was made by the military court to a United States attorney as is provided in article 47 (3), (b), and (c). It should be noted that the proposed A. G. N. article 35 makes such a provision.

Article 49 deals with the use of depositions. It seems to the Legion that this section loses sight of the ancient right afforded in English and American justice of the right of confrontation of an accused by his accusers.

It is believed that no greater latitude with regard to the use of depositions should be allowed in the proposed code than is presently allowed under the rules of criminal procedure presently in effect in the United States courts.

In this connection, in the present naval practice, a provision exists for the use of depositions, but, if used, the sentence given is not to exceed 1 year. In practice in the Navy during the war, if a man was charged with three offenses, the Navy felt that it was justified in using depositions and in sentencing, and approving a sentence, in such a case for the term of 3 years.

It seems that the military services were able to get along from their inception until comparatively recent times without the use of depositions to convict alleged guilty parties. In these days of airplane and other means of rapid transportation the necessity for the use of depositions seems to be less apparent than ever.

Article 52 deals with the number of votes required for a conviction under various circumstances. In each instance but one there is a qualification indicative of the fact that the required number of votes is to be determined based upon the number of members present at the time the vote is taken. It is not believed that this qualification is necessary. It is the position of the American Legion that all the persons who sat upon the court should be present at the time of the vote. Such requirement will eliminate any possibility of criticism.

Article 62 (a) is not believed to be proper. Generally speaking, when the charges against the defendant have been dismissed in a criminal trial, such action is tantamount to an acquittal, and in most jurisdictions a retrial cannot be had. This section, as written, allows the convening authority two bites or more of the apple and leaves wide latitude for abuse. Section (b) under said article also leaves room for abuses in the way of "doctoring" records, and unless safeguards of a substantial nature can be and are inserted in this section, it is not believed that the power should be granted.

Article 63 provides for rehearings if a convening authority disapproves the findings and sentence of a court martial. It is assumed that this gives a convening authority power to order a rehearing in a case where an acquittal has been returned, or that, in a case where a man has been charged with murder, if a manslaughter conviction is returned, after voicing disapproval, the convening authority can return the record to the court. In the code, as written, and with the control that the convening authority has over the courts and the officers thereof, this type of section countenances continuance of the abuse complained of so frequently in the last war to the effect that convening authorities ordered the courts to find as he desired. It is believed that, if it is found necessary to have such a provision, section (b) under said article could be more simply stated if it were unequivocably indicated therein that there was to be no rehearing if an acquittal resulted upon the first hearing of the charges.

Article 66 provides for reviews by boards of review. The Navy has never had anything comparable to this procedure. In section (b) of the article, there is indicated the types of cases which are to be referred to such boards. It is felt that the type of cases such boards are to consider should include cases where confinement for 1 year is assessed, so that, in line 8, on page 53, it should indicate that the confinement should be "* * * for 1 year or more" rather than "for more than 1 year."

Section (e) in said article has been commented upon at length by Commander Riter. This witness concurs in his views. It is earnestly hoped that the Congress will not pass any law which includes such a provision.

Article 67 sets up the Judicial Council and has been considered by Commander Riter. This is unquestionably a long step forward and may be the means of eliminating many of the abuses and complaints which have plagued the military with reference to courts martial. It is believed that the tenure of the members of the Council should be firmly established by legislation. The appointments should be by the President, by and with the consent of the Senate. The provision that the members be admitted to practice before the Supreme Court of the United States means very little, the requirements for admission to that court being solely that one has been admitted to the bar of the highest court of a State. Another criticism is that the type of cases which the said Council is to review are, in the opinion of this witness, too limited. It is my firm conviction that if adequate civilian review is had of every case in which a discharge, other than honorable or under honorable conditions, or a dismissal from the service, or in cases where sentences of death or of 1 year or more have been assessed, there will be a substantial lessening in the number of complaints against the type of justice afforded in military courts. I would be tempted to go so far as to say that a board of the type indicated, if established with sufficiently ample powers, could almost be said to eliminate the necessity for any other reform in the court-martial system. With sufficiently broad powers, the boards of review provided for otherwise in this code would be unnecessary.

For these reasons, I repeat that the provisions of this section providing for the cases which are to be considered by such a board are too limited.

Article 69 provides for review of cases other than those previously indicated. It merely indicates that such records shall be examined in the office of the Judge Advocate General. If previous sections of the proposed code, particularly article 66, section (b), are passed in their present form, the instant section creates the possibility that a person not a lawyer would be passing upon a record of conviction in which a sentence of 1 year had been assessed. In the office of the Judge Advocate General of the Navy, it has long been the practice to have law students review court martial records. It is believed that only persons trained in the law and members of the bar should be allowed to act in this capacity.

It will be noted that only if the findings or sentence are found unsupported in law will records be referred to a board of review and that, if so referred, there will be no further review by the Judicial Council. These limitations are not compatible with the type of review that should be had. In effect, if a law student tries to set a case aside, then, and only then, will the case be reviewed by trained lawyers. If the untrained individual (in the sence that he is not a lawyer) passes the case, it is assumed that there will be no further review.

The provisions of article 70, providing for appellate counsel, are satisfactory, insofar as Government counsel is concerned. It constitutes a forward step in other respects. It is not believed, however, that the Judge Advocate General should appoint the appellate defense counsel under the system contemplated by this code. It would be fairer and more consonant with American principles if such counsel were appointed by the Judicial Council.

Article 71 provides limitations on the execution of sentences extending to death or involving a general or flag officer. The proviso with regard to death sentences is laudable. That part relating to general or flag officers is a departure from the present Articles for the Government of the Navy. Presently no officer may be dismissed from the service until his conviction and sentence has been approved by the President. This witness sees no reason why there should be any departure from past practice of a restriction as indicated.

Section (b) of said article is also a departure from established practice—at least in the Navy. It is a depature which does not seem to be warranted. Technically, section (c) is a departure from present Navy practice. Now, at least technically, the Secretary of the Navy must approve the type of sentence indicated herein. A danger exists in this section in the limitation or proviso that the sentence must be suspended. There does not appear to be any real reason why a change from the present system is warranted.

Article 73 has been previously discussed by Commander Riter, with whose comments I agree.

Articles 74 through 134 list the punitive articles. Many of the punishments available to a court listed in these sections are drastic. It is the view of the American Legion that the Congress should spell out the limitation of punishment and should not leave such a serious matter to the caprice or action of a court which many times may be unaware of the seriousness of the offense charged.

Article 94 indicates that a person under certain circumstances who "creates any violence or disturbance is guilty of mutiny" and is liable to be punished by death. In the opinion of this witness, the quoted words should be stricken from this section for the reason that much too wide latitude is given under the section as written. If a person became involved in an altercation in a public street, and if this section is literally interpreted, he could be held to be a mutineer.

Article 106 refers to "lurking." This is much too broad a proviso in scope and punishment for such an offense. If the section was meant to convey "lurking and acting as a spy," etc., rather than "lurking or acting," etc., there would be no objection, and the American Legion believes there is necessity for such a statute.

Article 107, as written, should also make provision that any person who prepares or makes or directs the preparation of a statement of the nature indicated, in addition to the one who signs such a record, should be punished as indicated.

Article 118, section 3, as written, provides too much latitude to be passed as written. As this witness sees it, a drunken driver could be convicted of murder under this section.

Article 140 provides for delegation of the President's authority and for the subdelegation of such authority. This section is much too broad, and in practice it is feared will result in delegation of authority, specifically invested in individuals in the code as written, to too great an extent. In the notes furnished by the draftsmen of the bill, it is indicated that this is a provision of law already existent. Such is not believed by this witness to be the case, since it will be noted that the reference is contained in title I of Public Law 759, dealing with selective service, whereas the military law aspects of said law are incorporated in title II.

Senator KEFAUVER. Now, we are also considering H. R. 4080.

Mr. FINN. Yes.

Senator KEFAUVER. And we want to hear all the witnesses fully; but, frankly, the way we are going, I am afraid the summer will catch us before we get around to reworking and to the consideration of this bill. So, I do hope all of the witnesses will assist the committee. We want you to cover all the points, but please do so as briefly as possible, and the Chair will try to stay in better order also.

All right, Mr. Finn.

Mr. FINN. It is such an enormous field that it is very difficult to try to compress remarks into a very small area.

I will say, however, that I agree heartily with everything that Commander Riter has said.

At the end of the statement which I filed in the House, I have what I have been pleased to call an appendix. In that I have made

specific objections to specific clauses and portions of the bill as filed originally in the House and as filed originally here in the Senate.

The changes made by the committee in the bill which they have reported out—H. R. 4080—are negligible, in my view, and I do not believe that, with only two exceptions, a real objection that I raised in this appendix to the various clauses in the bill, were they remedied by one iota in the final action of the committee.

Now, as Commander Riter has said to you, the Legion passed a resolution last year in which they advocated one Judge Advocate General for the whole of the military services—Army, Navy, Air Corps, and Coast Guard—in time of war.

If I may say so, I spent 20 years practicing law, I spent 3 years reviewing general courts martial in the Office of the Judge Advocate General of the Navy, and in that capacity I had very ample opportunity to observe what went on, at least in general courts martial.

Subsequently, I assisted Judge Maguire in the filing of the report which is the basis of this bill which has been filed by the armed services, and, subsequently, Mr. Forrestal appointed me as a member and recorder, alternate recorder of the Ballantine Board, again whose actions are the bases of these findings, but I would like to call the attention of this committee to this fact, that both Judge Maguire and the Ballantine report, and in the Ballantine report the Ballantine committee made certain recommendations for the enlargement of the jurisdiction given to the subordinate courts in the Army and the Navy, but when they did that they were very specific in their insistence that the powers of the review boards and the courts of review—and incidentally they said a board of civilians should review all cases wherein a bad conduct discharge or any kind of discharge, or any kind of discharge, even by way of an administrative dismissal, were to be considered by anybody in the armed services, those cases there should be and must be, if we want justice, by a group of civilians to review the dismissal of or the discharge of before the person is out of the service.

In that connection, the theory behind it all, as I recall it and as I am certain it was intended, you know, as well as I, that when a person is taken into the armed services in wartime particularly and even now today, he is taken in by a draft board which consists of civilians, and they take up this man and this man, and they say, "Son, you go to the service; you are in." But when they get out of the service, the 17 and 18 year old boys—and I want you to bear that this is no idealistic conception on my part, I am as hard-boiled as I believe the next person, but when you take the 17 and 18 year old boys and give them administrative discharges, dishonorable discharges, bad conduct discharges I believe they are, that anyone advocating this legislation, anyone passing upon it, should insist that civilians of equal caliber to those who put them in the service should at last have the opportunity to review the type of discharge which they have obtained from the armed services.

Now, there may be an objection that that will be a costly process. I wonder how much the Navy spent with their boards and the various boards following this war, to rectify a situation which they themselves realized would not stand the light of publicity or public exposure.

Now, they appointed a board—Mr. Larkin sat on it—which was a board for the review of all cases of people who were then in prison, to attempt to change the type of incarceration of discharge which they

were to receive. But I ask you what happened to all the hundreds and thousands who were not in prison but who had been released from prison before that board ever sat? Grave injustices were done to some of these people, and I know that the Larkin Board did wonderful work—the O'Keefe Board it is—did wonderful work in changing and rectifying many of those sentences. That was a group of civilians, and the Navy brought civilians in at that time to do the work which we are now advocating should be done all the time in these cases.

Now, I say that if we do not have some type of civilian review, we are not going to accomplish anything here.

Senator KEFAUVER. Mr. Finn, you do not think the court of military appeals is sufficient civilian review?

Mr. FINN. I think that the board of military appeals as set up now, the court, is a wonderful forward step, sir. I would rather have that than nothing, but, as, General Riter says, I believe it is almost useless to set up just a board unless you give such a board or court, whatever you wish to call it, the power to consider the facts and the power to act upon the sentence, the power to exercise clemency in cases where a man get 40 years for a crime which in civil life would be about a sentence of 2 years or possibly the man would be placed upon probation by a Federal judge.

Now, I believe that thus you should extend not only the powers of that board to hear certain types of cases, but you should, as General Riter has suggested, allow them to consider the facts as well as the law, but you should go one step further and you should suggest that that board be allowed to consider every case in which a bad-conduct discharge or dishonorable or other type of discharge, other than honorable or under honorable conditions, is given the individual, and I say that for this reason: that, as set up, this court is too restricted by qualifications, and so forth, as to the kind and type of case that they can hear.

For example, they are allowed to do—if the Judge Advocate General sends the case up to them, they can consider that one, and then again they can consider a case where a general or a flag officer is concerned, if he is going to be treated.

Then, they say, "or any sentence where death is given to any other individual," then they say, "all cases reviewed by a board of review in which upon petition of the accused and on good cause shown, the Judicial Counsel has granted a review."

Now, that, to me—that is section 67 (b) (2) under S. 857, and that has not been changed in the House bill 4080.

Senator KEFAUVER. Mr. Finn, in connection with the board of review, article 66, or section 66 of H. R. 4080——

Mr. FINN. Yes, sir.

Senator KEFAUVER. It provides, of course, that each board shall be composed of not less than three officers or civilians. Would you suggest that this board be all civilians or a mixed board, or what composition would you recommend?

Mr. FINN. I would recommend, sir, that they have all civilians, unless you change this court to allow the court to consider these cases of bad-conduct discharges and administrative discharges without any qualification whatever. In other words, unless there is an automatic

right of appeal to such a court, then I would say you should have all civilians on your board of review, and I say that for this reason, sir: Regardless of whether you have a corps or whether you have a group of officers who are in a legal specialist group or whatever you may be pleased to call them, you are always going to have those men subject to the influence of someone who is in higher rank than they. Their entire career will depend upon the sickness reports that they get, and they are——

Senator KEFAUVER. Well, we know the argument; just give us your recommendation.

Mr. FINN. Well, my recommendation, sir, is that, frankly, I think that perhaps the services would be handicapped if you put all civilians on such a board of review in the Office of the Judge Advocate General.

I think, perhaps, the difficulty would be that they would not have personnel or be able to get money enough to finance such a set-up; but I do, if I do not impress upon you any other thing, sir, and I would like to emphasize and impress upon you my view, and that of the American Legion, as to the necessity for enlarging the jurisdiction and the type of case that this court of military appeals can hear, and not only that to increase their powers and their authority to deal with various types of cases.

It can be done, and it is very simple: The argument may be raised that it will be an expensive proposition, but I do not believe that in the long run such a proposition will be any more expensive than will be the situation that existed after this war, where so many boards and so many review groups were set up for the purpose of investigating what had happened during the wartime years with relation to this type of case.

Now, may I add just one thing, sir: I would like to reiterate everything I have said in the statement here, but I would like to say to you now that I am sure that a Judge Advocate General's Corps in the Navy would be just as workable as a Judge Advocate General's Corps is workable in the Army, and I cannot for the life of me see how you can have uniformity unless you have a corps in every one of the military services; and why the Army should have a corps, if it is a bad thing, why stick the Army with it?

If it is a good thing, let us have it for every service. Now, there is the argument that I present. If a Judge Advocate General's Corps is not any good for the Army, I cannot see why it is any good—if it is no good for the Navy, I do not see why it is any good for the Army.

Now, no one contends that you should put a legal officer in every rowboat that the Navy owns, and that is the impression you get from reading the adverse testimony with respect to a Judge Advocate General's Corps being set up in the Navy. They claim that you have stations which are too small to have a legal set-up. You cannot have a legal man aboard a battleship or something of that sort.

Well, in my experience during the war, outside of summary courts martial, I saw very few; and I am tempted to say I saw none of the cases that were tried before general courts martial that were tried aboard ships. They put the boys ashore, or they had them in some flotilla or squadron where they had an ample number of lawyers.

Senator KEFAUVER. Mr. Finn, page 1174 of the House record sets forth that the Department of the Army has estimated that there would be a total need of 1,100 officers.

Mr. FINN. Yes; I read that, sir.

Senator KEFAUVER. To have a corps; and the Air Force, that they will need 750. Do you know how many the Navy will need?

Mr. FINN. I would say——

Senator KEFAUVER. That is, legal officers.

Mr. FINN. Sir, if the Navy—if the figures, so far as the Army and Air Force are concerned, are correct, I would say I would not conceive that the Navy would need any more than 300. The Navy has always operated on a proposition that they are going to have approximately 10 percent of the number of people who are in the service court martialed or subject to some type of disciplinary proceeding each year, and it is all dependent, I assume, upon the number of people which they have in the Navy now.

I do not think there is any reason under the sun why they cannot have a corps in the Navy—why there cannot be a corps in the Navy.

Senator KEFAUVER. One further question, Mr. Finn: Do you think the Spiegelberg recommendation would work for the Navy? Would you tell us briefly how you think it would work, if you do think so?

Mr. FINN. I have not any knowledge of what Mr. Spiegelberg said here, sir, but I do know that he said——

Senator KEFAUVER. Well, he said the same as he said in the House.

Mr. FINN. What he said in the House, so far as I am concerned, is absolutely workable in the Navy. I see no reason at all why it cannot work; and since we are interested in uniformity here, since we are interested in unification, it seems to me that the Navy, just because they are aboard ship, and so forth, many things, I agree, insofar as company punishments are concerned, the Navy should have a little different set-up than the Army has there, because they are aboard ship, the captain of the ship is the master of the ship, and he must be in control all the time, and his orders must be obeyed, but I do not see why when you come to the point where the captain of the ship says, "Young man, I am going to have you tried for something," that all that disciplinary aspect of the situation should be washed away, and unless and until the man has been tried and convicted, then it reverts to the disciplinary status again.

Senator KEFAUVER. Well, let me ask you this question: When the captain of a ship feels that a young man should be tried, who selects the court in the Navy?

Mr. FINN. The captain of the ship. He is the only one who does. No one else would have the temerity to do it.

Senator KEFAUVER. Then, under the Spiegelberg plan, any case where the young fellow felt that the court was being influenced by the captain of the ship, how would you select a court? How would you provide for a selection?

Mr. FINN. I believe that if you are going to try people aboard ship, sir, you just cannot work that set-up. But if you are going to try people, as the great majority of men were tried during this last war, at shore stations and in flotillas and squadrons, and so forth, like the Eighth Fleet, Halsey's fleet, and various other fleets in the Pacific, I think that there, since there was a large number of ships with hundreds of thousands of men available, and thousands of officers, that there would be no difficulty whatsoever in putting into effect this type of proposition under those conditions. But, of course, if you get down

to the class of a destroyer, I do not think you can do it very well, if that destroyer is all by itself.

Senator KEFAUVER. Then, you would have to provide some way of holding the alleged offender until he got back to shore, got back to a naval establishment.

Mr. FINN. Well, insofar as all serious offenses are concerned, sir, that is what they have always done—not exactly back to shore, but at last—now, for example, they had a fleet, the Atlantic Fleet, tied up in Portland, Casco Bay, Portland, Maine, during the early part of the war, and they had a great many courts martial, general and summary courts martial, right in Casco Bay, which is outside of Portland, Maine.

That type of thing, although you may be sure they were tried aboard ship, and the men were brought back to shore, I see no reason why they cannot continue that sort of thing.

Senator KEFAUVER. All right. Are there any questions, Mr. Galusha?

Mr. GALUSHA. I have no questions.

Senator KEFAUVER. Anything else, Mr. Finn?

Mr. FINN. I have nothing else.

Mr. RITER. Mr. Chairman, may I just take one moment to tell you that I omitted to speak on article 73, petition for a new trial with respect to the Judge Advocate General provision. The Brooks bill emasculates it. As it appears in the present code, it gives the accused a break he did not possess under the old one. Now, the Brooks bill comes along and gives that right for a new trial only on the ground of newly discovered evidence or fraud on the court.

I make a special plea that the present provision of the Elston bill be retained.

Senator KEFAUVER. Thank you, General Riter.

Mr. Wels.

## STATEMENT OF RICHARD H. WELS, CHAIRMAN, SPECIAL COMMITTEE ON MILITARY JUSTICE, NEW YORK COUNTY LAWYERS' ASSOCIATION

Senator KEFAUVER. Mr. Wels, you are chairman of the New York County Lawyers' Association, committee on military justice?

Mr. WELS. Yes, and I am appearing for the committee as a representative of the New York County Lawyers' Association.

Senator KEFAUVER. Mr. Wels, your statement will be printed in the record at this point, and you may proceed from there.

(The prepared statement submitted by Mr. Wels reads, in full, as follows:)

STATEMENT OF RICHARD H. WELS, CHAIRMAN, SPECIAL COMMITTEE ON MILITARY JUSTICE OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION

Mr. Chairman and members of the committee, my name is Richard H. Wels. I am appearing before this committee as a representative of the New York County Lawyers' Association, and speak to you as chairman of the association's special committee on military justice. I should like to point out that all of the members of our committee saw active service overseas during World War II, and that they are presently Reserve officers of the Army, Air Force, and Navy. I myself am a

lieutenant in the United States Naval Reserve, but the views expressed by me here are, of course, not to be construed as the views of the Navy Department.

With the permission of the committee, I should like to place in the record a copy of the report made by our committee last fall containing our recommendations to the group headed by Professor Morgan which drafted the bill now before you. This report, which was made at the invitation of Professor Morgan, met with the full approval of our association.

The bill now before you represents a long step forward in court-martial reform. That the representatives of the three services have been able to agree on a uniform code of procedure, on uniform terminology, and uniform substantive laws is an accomplishment which few thought could be brought about. No one should underestimate the difficulties of that task, and the patient effort required to bring it about. It invites the hope that some day the ultimate objective of a single Judge Advocate General's Office, servicing all of the armed forces out of the office of the Secretary of Defense, will be realized.

We like many things about this bill. Our criticisms are not directed so much at what it does, as at what it does not do. Frankly, we are going to play Oliver Twist and ask for "More."

When Professor Morgan invited our views as to what ought to be in the model courts-martial bill which was being drafted, we told him that the basic reform without which there would be no such thing as real courts-martial reform, or in fact real courts martial, was the elimination of the domination and control of courts martial by command. The phrase "command control" is vague and indefinite to those not close to the picture. Let me explain what we mean by it. Under the existing system the same commanding officer is empowered to accuse the defendant, to draft and direct the charges against him, to select the prosecutor and defense counsel from officers under his command, to choose the members of the court from his command, to review and alter the court's decision, and to change any sentence imposed. Although the military and naval courts take oaths "to well and truly try, without prejudice or partiality, the case now depending, according to the evidence which shall be adduced, the laws for the government of the Navy, and your own conscience" those courts have too often been told by the commanding officer who appointed him that when he ordered a court, it meant that he had concluded the man was guilty, but that he could not impose a sufficient punishment himself. Too often the courts have been told that they were expected to bring in verdicts of guilty, and impose specific sentences—and told that even before they had heard the testimony of witnesses.

That is command control. And the control is exercised by reason of the fact that the participants in the courts (the judges, the prosecutors, and the defense counsel) are subject to the full command of the officer who appointed them, and that their service careers are in his hands. If you will read the press release issued by Secretary Forrestal's office when this bill was introduced, you will see the statement there that under this bill all of these powers which add up to command control are retained. The commanding officer still appoints the officers under his command to serve as judges and as prosecutors. He still reviews their decisions, and he has complete power to influence their decisions by the fact that he controls their promotions, assignments, leaves, and fitness reports. There is no question that this bill retains command control in all of its ugly aspects.

We are not alone in urging the elimination of command control and the creation of truly independent courts within the services. Every board and committee appointed by the War and Navy Departments has made this same recommendation, including the famous committee headed by Chief Justice Arthur T. Vanderbilt of New Jersey. The American Bar Association has made it. Veterans groups have made it. The recommendation comes from all of those concerned with our democratic way of life, who feel that it is not too much to ask that the citizen army of a democracy be given that fundamental fair play and assurance of justice which our country is trying to give to the rest of the world. It is ironic that those who are being subjected to a peacetime draft for the first time in American history themselves are not given the basic rights which our Government seeks to give the rest of the world through their service.

I should like to emphasize that we are as much concerned about the maintenance of discipline in the armed forces as are those who seek to retain command control. We believe that discipline is dependent in a large degree upon the morale of the men who make up the services, and we do not believe that there can be good morale when men feel that the service courts which are set up to do them justice are not real and fair courts as we think of them here in America. There is little difference between an Army court which has been influenced by its com-

manding officer and the Budapest tribunal which recently convicted Cardinal Mindszenty.

We feel that the commanding officer must and should be able to place a man on trial and control and direct the prosecution. But the judicial machinery itself must be in the hands of an independent judicial system within the services which, not subject to pressure and influence from command, will insure the accused the same fair trial by competent personnel that he would receive in our criminal courts were he a civilian. This can be accomplished by including in this bill the recommendations of the Vanderbilt Committee for the creation of independent Judge Advocate General's Departments within the services which will operate the courts of the services. It is interesting to note that Great Britain, from which our own systems of military and naval justice derive, has itself effected this reform, and that in England today the Judge Advocate General is now appointed by the Lord Chancellor, who is England's chief justice. It ought to be noted that this reform in Great Britain was not the work of a Socialist government, but was the recommendation of the Lewis Committee, composed of leading judges and generals.

If the power of appointing the court and defense counsel is to rest with the Judge Advocate General's Department, as we propose, and if the judicial review of courts martial is to be in the higher echelons of the Judge Advocate General's Department, this presupposes that there will be in each department an independent Judge Advocate General's Corps free of the control of command in matters of promotion, assignment, leaves, fitness reports, etc. Such a professional corps already exists in the Army. It never has existed in the Navy, where line officers have been assigned legal duties. The Air Force has sponsored a bill already introduced which would exempt it from the necessity of having such a corps.

Establishment of such corps is not the departure from precedent that we are led to believe. It would be no different than the Medical Corps, the Dental Corps, the Chaplains Corps, and the Engineers Corps which have existed for many years and without criticism. We believe that matters affecting the lives and liberties of millions of men are sufficiently important to require the services of specialist officers. Failure to create such corps in the Navy and the Air Force will itself frustrate the purposes of the bill before you, since this uniform code cannot receive uniform application when it is administered by trained specialists in the Army, and by nonspecialist officers in the Navy and the Air Force.

A long step in this direction has been taken by the House Armed Services Committee in section 13 of article 140 of H. R. 4080. That section provides that hereafter the Judge Advocates General of the Navy, the Army, and the Air Force must be members of the bar of a Federal court or of the highest court of a State, shall be judge advocates or law specialists, and shall have had at least 8 years' cumulative experience in a Judge Advocate's Corps, department, or office, the last 3 years of which prior to appointment shall be cumulative. We strongly recommend the enactment of this provision. It will do much toward establishing the legal corps which we have repeatedly urged. Obviously, a Judge Advocate General who is himself an expert and a specialist will do much to see that his staff reflects his own high level of competence.

I should now like to address myself to specific provisions of the bill before you.

One of the admirable provisions of the bill is article 67, which creates a judicial council whose members shall be appointed by the President from civilian life and who shall receive the same salary as judges of the United States court of appeals. Such judicial council is to be the final reviewing authority of courts martial. The provision for such a judicial council is a forward-looking step, and will do much to remove the confusion that now surrounds reviews. However, the language of the section is in itself confusing. It does not specify how many members of the council there shall be. It does not indicate whether they shall be appointed by the President alone, or by and with the advice and consent of the Senate. It does not say whether they shall serve for life, for a tenure of years, or at the pleasure of the President.

We believe that if the members of the judicial council are to have the pay and status of the judges of the court of appeals, they should be appointed in the same manner and under the same conditions as such judges. We recommend that a specific number of members of the judicial council shall be provided for, and that they shall be appointed with Senate confirmation for life and good behavior.

These recommendations of ours have also been incorporated by the House committee into H. R. 4080, which, while changing the name of the judicial council

to the Court of Military Appeals, has provided that that court shall consist of three judges appointed from civilian life by the President by and with the advice and consent of the Senate. The tenure and compensation of such judges is fixed in H. R. 4080 as the same as that of judges of the United States courts of appeals. We strongly approve such amendment.

Also with reference to the review provisions of the bill, article 66 (e) provides that within 10 days after any decision by a board of review, the Judge Advocate General may refer the case for reconsideration to the same or another board of review. We believe that this provision destroys the independence and integrity of boards of review, and that it should be stricken. There is ample provision for reveiew by the judicial council of the board of review's decision. The House committee has also accepted this recommendation and stricken this provision from H. R. 4080.

Article 2 (11) of the bill has by its language what I am sure must be an unintentional impact upon the civil liberties of the civil populations of Guam, American Samoa, and the trust territory of the Pacific. At the present time the civil populations of those American territories are under the supervision of the Navy Department. On June 19, 1947, the President sent a special message to the Congress (80th Cong., 1st sess., Doc. No. 333) in which he advised the Congress that the State, War, Navy, and Interior Departments had jointly recommended the enactment of legislation to grant citizenship, a bill of rights, and civil government to the people of Guam and American Samoa. In that message the President requested the enactment of such legislation. While such legislation has not yet been enacted, it is inconceivable that the same departments which made that recommendation should now recommend contrary legislation which, instead of making the peoples of our American colonies the possessors of the basic civil rights, would subject them to trial by Army and Navy courts martial. The language of article 2 (11) should be revised so as to except from the persons subject to the jurisdiction of courts martial the civil populations of Guam, American Samoa, and the trust territory.

At the hearings before the House committee, Mr. Felix Larkin, speaking for the National Defense Establishment, stated that it was not the intention of the drafters of the bill (S. 857) that the military or naval services should acquire under article 2 (11) jurisdiction of such civilian populations of Guam, American Samoa, and the trust territory. Mr. Larkin stated that the making of such statement should establish adequate legislative history to prevent a contrary position being taken at a later date. It seems to us, however, that if there is neither intention nor desire on the part of the military and naval authorities to obtain or exercise such jurisdiction, a clear proviso to that effect should be included in the bill. It would certainly clarify the question.

Article 55 of the bill prohibits the imposition of any cruel and unusual punishments. We feel that the spirit of this section is violated by article 15 (a) (2) (F) which permits the commanding officer himself to impose upon an enlisted person in any of the armed services confinement on bread and water for 5 days. At the present time such punishment cannot be inflicted by any civil court, or, indeed, by any court in the Army or Air Force. It may only be imposed by a naval officer. It is our considered judgment that the extension of bread and water punishment to all the services open the doors wide to future Litchfields. Such punishment to our minds seems cruel and barbaric, and to fit in the same category as the floggings, brandings, and tattooings which are specifically prohibited by article 55. Such punishments, when imposed by the Japanese and the Germans in World War II met with the highest condemnation of the American people. They will meet with the same condemnation when imposed by American officers on American men. We understand that the retention of such punishment has been requested by the Navy Department on the ground that merely confining a man at sea is no punishment, since it operates merely to free him from the performance of his duties. Other punishments are available, however. At the very least, this section should be limited so that a man may be confined on bread and water only while he is at sea. This recommendation, too, has been accepted by the House committee, and section 15 (a) (2) (E) and (F) of H. R. 4080 provides that such punishment may be imposed only upon a person attached to or embarked in a vessel.

Article 28 provides that a reporter at a court martial shall make a record of the proceedings of and testimony before the court. Under present procedure, the reporter does not make a record of the opening and closing arguments of counsel. We feel that such arguments should be recorded, and that the bill should so provide. This is important since, in the review of courts martial,

trial counsel are not normally afforded an opportunity to present their views to the reviewing authority. Only by a reading of their arguments can their views and theories be made known.

Article 37 prohibits commanding officers from attempting to influence courts martial. This provision flows from article of war 88, as embodied in the Elston bill. The latitude which is directly given to command to interfere in the business of courts martial even under this provision is demonstrated by article 87 of the new Army court-martial manual, which provides that:

"A commanding officer may, through his staff judge advocate or otherwise, give general instruction to a court martial which he has appointed, preferably before any cases have been referred to it for trial. Such instruction may relate to the rules of evidence, burden of proof, and presumption of innocence, and may include information as to the state of discipline in the command, as to the prevalence of offenses which have impaired efficiency and discipline, and of command measures which have been taken to prevent offenses. Such instructions may also present the views of the Department of the Army as to what are regarded as appropriate sentences for designated classes of offenses. The commander may not, however, directly or indirectly give instruction to or otherwise unlawfully influence a court as to its future action in a particular case."

It is our view that this article, although we support its purpose, is ineffective to accomplish that purpose. We believe that the inherent powers of commanding officers are such that, if they desire to manifest their displeasure at the manner in which members of a court appointed by them have handled a case, they can readily do so through the exercise of administrative discretion without furnishing any overt proof of a violation of article 37 by them. This article is ineffective in the case of a commanding officer who desires to influence or dominate a court.

Certainly a minimum requirement would be a prohibition against a commanding officer discussing with members of a court martial a case which has been assigned to them for hearing until after the case has been heard and their decision recorded.

Article 54 (c) should specifically provide that, in addition to a copy of the record of the proceedings, the accused shall be furnished with copies of all documentary exhibits.

Article 88 provides that any officer who uses disrespectful language concerning the President, Vice President, Members of Congress and of the Cabinet, Governor, and members of State and Territorial legislatures shall be subject to court-martial action. In view of the recent case of Captain Dierdorfer on the west coast, and general public reaction to the punishment awarded that officer, it is our view that careful consideration should be given this section, and that it should be safeguarded against the political martyrdom of service personnel.

Articles 118 and 120 make drastic revision in certain present practices. At the present time military personnel who are charged with murder and rape committed in the continental United States during peacetime are tried by civilian courts. These new articles would make such offenses punishable by general court martial. Such offenses are serious crimes. Their prosecution and punishment in peacetime should not be taken away from the civilian authorities and entrusted to the services until adequate specialist corps have been established in all of the services which can assure that they will receive adequate competent disposition.

I should like to conclude with a few remarks about special courts martial, the three-man courts provided for in article 16. These correspond to the present summary courts martial in the Navy, and special courts martial in the Army. It has been my experience (and that of most other Reserve officers) that the principal abuses in courts martial occurred in such courts, which were invariably appointed by the commanding officer of the ship or unit in which the offense occurred. Such officers, who had close connection with the personalities and problems involved, have a greater concern with the outcome of a case than does the officer with general court-martial authority, who is usually on a high echelon. The bulk of the cases in which command exercised its influence over the courts occurred in such cases.

Such special courts have far-reaching powers. They are, for instance, authorized by article 19 of the present bill to award bad conduct discharges. All of you are familiar with the fact that a bad-conduct discharge can cripple a man's life, and do him irreparable damage. Yet a great many of the safeguards which this bill throws around general courts martial are not available in special courts. Thus, law officers are not required on special courts, and both the prosecutor and defense counsel may be persons without legal training. I can envisage situations

where it is not practicable to furnish such safeguards in special courts, but I think that in the great majority of cases they can be made available. Certainly if they are not, the special court should not be able to award a bad-conduct discharge. We recommend that your committee revise the language of the bill so as to require the furnishing of all safeguards in special courts wherever practicable, and to require a certificate from the commanding officer setting forth the reasons why it was not practicable to furnish them in such cases where they were not.

In conclusion, I should like to state that the bill before you, while not the ideal measure for which we have striven, is a large improvement upon the existing system. Amendments of the character which have been suggested will make it a good bill, and will give to our citizen Army, Navy, and Air Force, and their families, the assurance that they are receiving the full benefits of that American way of life for which they are willingly risking their lives.

Senator KEFAUVER. We want you to testify fully, but please be as brief as you can.

Mr. WELS. Surely.

I also want to add that I am also a member of the special committee on military justice of the Association of the Bar of the City of New York, and I am authorized to state that the views expressed by me today represent the views of that association as well as of the New York County Lawyers' Association.

As I said in my statement which has been submitted to you, we approve very largely the things which have been said—which have been provided for in the bill before you. We think it is a great accomplishment that the services have been able to agree upon a uniform code, and to have a uniform substantive law.

We do not quarrel with that, but what we thing is that that is just a short step in the right direction.

We hope that some day the ultimate objective of a single Judge Advocate General's Office in serving all of the officers out of the Secretary of Defense will be realized.

We feel that the creation of a single Judge Advocate General's Department is not as impractical and not as unfeasible as has been suggested by other people. We think that some day we are going to have to come to it.

I do not know if your committee feels that this is the appropriate time to do it, but if you are able to write such a provision in the bill, we think that you will have accomplished something which otherwise might take many years to accomplish.

When Professor Morgan of Secretary Forrestal's committee invited our views as to what ought to be in the model courts-martial bill, we told him that the basic reform without which there would be no such thing as real courts-martial reform or in fact real courts martial, was the elimination of the domination and control of courts martial by command.

The phrase "command control" is vague and indefinite to those not close to the picture. Let me explain what we mean by it: Under the existing system the same commanding officer is empowered to accuse the defendants, to draft and direct the chages against him, to select the prosecutor and defense counsel from officers under his command, to choose the members of the court from his command, to review and alter the court's decision, and to change any sentence imposed.

Although the military and naval courts take oaths—

to well and truly try, without prejudice or partiality, the case now depending, according to the evidence which shall be adduced——

Senator KEFAUVER. Mr. Wels, are you going to read your statement?

Mr. WELS. No, I just wanted to read that paragraph, Senator, because I think that is the guts of the whole argument.

Senator KEFAUVER. We get a whole lot more out of it when you tell us about it.

Mr. WELS. Yes. In other words, we think the ability which our courts martial, both general and summary, have to dominate and influence the decisions of the courts which they appoint, is the thing which ought to be changed in the present system of military and naval justice.

We think that unless you make some change in command control and set up an independent judiciary within the services and part of the services, but completely independent from the chain of command, you have not accomplished real courts martial reform.

That is the one phase of our recommendations to the House which was not, of course, accepted.

We will want to point out, of course, that that recommendation is the same recommendation which has been made virtually by every bar association, every veterans' organization which has come before you.

When we talk about command control we do not mean that the commanding officer should not be allowed to place the man on trial or to prefer charges against him. We think he ought to. We think he should be able to control the disciplinary process; that he should, when a man has committed an offense, be able to prefer charges, to place the man on trial. But there his role should stop, and then the independent courts within the service, not subject to his control, should give the man the same type of fair judicial trial which he would receive anywhere within the American system and which, of course, is the system of democracy which we are trying to sell to the people against whom these armed forces will, if they are ever used, be used.

I want to refer to the question of legal corps, which is a corollary of the proposition of removing command control.

The bill before you is called a bill for a uniform code of military justice. Yet, that bill creates a professional corps within the Army and leaves no professional corps whatever within the Navy or the Air Force.

I think that the present situation in the Navy is probably best illustrated by an incident related by the late Secretary of the Navy Josephus Daniels in his memoirs, which I would briefly like to state. It is a short one and it is contained in that work.

Daniels says in his memoirs of his days in the Navy Department:

> When I entered upon the duties of the office Capt. Robert Lee Russell was the Navy Judge Advocate, and he wrote very long opinions in every case with the citation of so many authorities that it would take a day to wade through them.
>
> When his term of office was over, there was another officer to succeed him, but before appointing this officer, I said, "Ridley, have you ever read law or do you know any law?" He said, "No." I said, "Good. In that case I will make you Judge Advocate General."
>
> I said, "I want a man who will decide cases without such a wealth of authorities as will make me sit up all night to read his opinions."
>
> Some time after he had entered upon his office, he decided to study law. Within a few months he was as long-winded, and was quoting as many authorities as Russell. I sent for him one day and I said, "Ridley, it is time for you to go to sea. I appointed you because you did not know any law, and would get at the justice without any lengthy citations, but you are writing as long and as dull opinions as Russell. I will have to get me a new Judge Advocate General, and I will send you to Guam."

With all due respect to Admiral Russell, who, of course, is not the Judge Advocate General Russell who is described in this incident, I think that the present system in the Navy is not greatly a departure from that described in Daniel's memoirs, and we think that it is about time that a legal corps was established within the Navy and the Air Force.

You call this code a uniform code, but it is very difficult for us to see how you are going to obtain the uniformity which is the objective of the legislation if you are going to have the uniform substantive provisions enforced by professional corps in one service and by amateurs in the two other services.

Senator KEFAUVER. Are you for the amateurs or are you for the professionals, Mr. Wels? After your reading of Mr. Daniels' memoirs, are you for the professional or for the amateur?

Mr. WELS. I think I am for the amateur-professionals.

I get the impression from reading the Navy Department's statement before the House committee that they have the impression that we are trying to burden the Navy with a great many legal offices in every billet, and as Mr. Finn said, in every rowboat. That is not the case at all.

We do not say that every officer who performs legal duties in the Navy or in the Air Force or in the Army shall perform legal duties exclusively. What we do say is that every person who is assigned to a legal billet shall have legal qualifications and if there are other duties which he can perform it is probably as well that he should perform them, but it is the important thing to have your legal duties performed by professional lawyers.

We think that means that liberty and men's lives are as important as the medical treatment which they receive in hospitals, as the spiritual treatment which they receive from the chaplains, as the dental treatment which they receive from dentists, all of which have previously had specialized corps established for them.

We find that article 67 of the bill creating the court of military appeals or judicial council, as it is called in the House version, is an excellent one. We like the provisions in the revised House bill which are not in the present Senate bill, making those appointments life appointments, and requiring that the judges be appointed in the same manner as judges of the court of appeals.

With respect to the court of military appeals, as with respect to all of the other provisions of this bill, I would like to comment upon the fact that the effective date of this legislation is to be 1 year from the date that the bill was signed. In other words, all of this machinery that is being established here is not going to go into action for more than a year. That seems to us to be an undue length of time, and I think your committee might well consider whether it would not be feasible and desirable to set up your court of military appeals, as well as the operative date of the entire code at as early a date as possible to give the men of the services the benefit of it at as early a date as you can.

Apart from that I want to reiterate the various recommendations which are made in our statements which we presented the House committee, and many of which, excepting those relating to command control and legal corps, were accepted by the whole House.

I should also like to place in the record, Mr. Chairman, a copy of the report which we filed with Mr. Morgan's committee, as well as a copy of an editorial appearing in the May 6 issue of the New York Times entitled "For Military Justice," endorsing the views which Mr. Spiegelberg and we have presented to you.

Senator KEFAUVER. Without objection, they will be included in the record as exhibits to your testimony.

Mr. WELS. Thank you, I have nothing else.

Senator KEFAUVER. Thank you very much for giving us the benefit of your views.

(The documents referred to are as follows:)

[From the New York Times, May 6, 1949]

FOR MILITARY JUSTICE

A bill to set up a new uniform code of military justice was passed by a House voice vote yesterday and sent to the Senate. It is a good bill, as far as it goes, but it doesn't go far enough. What it does to provide like procedures in the various service arms is an essential part of unification and should be supported and approved. What it does not do is to meet fairly the challenge of the command role in the whole courts-martial set-up.

Under the existing practice, and the House has left it unchanged, a commanding officer orders a court-martial and becomes the convening officer. That is, first of all, he appoints the members of the court. But he does more. He also appoints the trial judge advocate and the defense counsel. At the end of the trial the commanding officer reviews the record and has, as a rule, the power to order the sentence executed. This is grave responsibility and great authority to place in the hands of one man, however great his competence and his integrity. A commanding general might not himself wish to influence the finding of a court, but when every man on it and connected with it is under the general's command and, in a sense, dependent upon him, it would be difficult to escape a situation in which his influence was felt. Actually, this weakness in procedure is so grave that it is surprising that the court-martial system has worked even as well as it has.

An alternative is not difficult to find. One workable plan has been submitted the War Veterans' Bar Association; Richard H. Wels, chairman of the special committee on military justice of the American Bar Association. He has been supported by Arthur E. Farmer, chairman of the committee on military law of the War Veterans' Bar Association; Richard H. Wels, chairman of the special committee on military justice of the New York County Lawyers' Association; and J. A. Clorety, national vice commander of the American Veterans' Committee. Their testimony is expert in character and sound in direction.

The Senate will be well advised in taking up this measure to do what the House has thus far failed to do. It should amend the bill to provide that courts-martial be convened outside the scope of "command control."

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REPORT OF THE COMMITTEE ON MILITARY JUSTICE OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION

Earlier this year Secretary of Defense James V. Forrestal appointed a committee consisting of Prof. Edmund M. Morgan, Jr., of the Harvard Law School as chairman, Under Secretary of the Navy W. John Kenney, Assistant Secretary of the Army Gordon Gray, Assistant Secretary of the Air Force Eugene M. Zuckert, and Felix E. Larkin, assistant general counsel of the Department of Defense, as executive secretary, to draft a code of military justice uniform in substance and uniform in interpretation and application to all of the armed services. In his precept establishing this committee, the Secretary indicated that this uniform code should protect the rights of those subject to the code wihout impairing the performance of military functions.

Having noted the previous activities of this association in the field of military and naval justice, the Morgan committee on September 27, 1948, invited the association to submit our recommendations with respect to deficiencies in the

present Articles of War and Articles for the government of the Navy. Upon referral of Professor Morgan's letter to our committee, we have carefully reviewed our earlier reports on military justice, the changes effected by the Elston bill enacted in the closing days of the second session of the Eightieth Congress, and the proceedings before the House and Senate Committees on the Armed Services, and have generally studied the problems of military and naval justice.

The limitations and inadequacies of our systems of military and naval justice were graphically portrayed to the public and to Members of Congress during and after World War II by many service men and women, lawyers and laymen alike, who had had first-hand experience with the operation of such systems, and found that resemblance between them and the courts which they knew as civilians was largely coincidental. It was disturbing to them to find that the same official was empowered to accuse, to draft and direct the charges, to select the prosecutor and defense counsel from the officers under his command, to choose the members of the court, to review and alter their decision, and to change any sentence imposed. They were shocked to learn that an offense committed by an officer was subject to different treatment and punishment than the identical offense committed by an enlisted man. They were surprised to find that many of the judges, prosecutors, and defense counsel participating in courts martial were neither lawyers nor trained in the law, and that, in the naval services, there was not even the minimum requirement that a single law member be on a court.

The reports that came back of these things to the civilian community, together with specific instances of abuse in the court-martial process, initiated a flow of bills into the congressional hopper and an expression of aroused public opinion which gave promise that reforms would be accomplished. The Secretary of War and the Secretary of the Navy each appointed boards of distinguished citizens to review the court martial systems of their respective services, and to make recommendations for a thoroughgoing revision of military and naval justice. The famous Vanderbilt Report, made to Secretary Patterson, and the Ballantine and Keeffe Reports, made to Secretary Forrestal, all found substance to the charges which had been leveled at the court martial systems, and presented definitive recommendations for the elimination of the conditions which made such charges possible.

The jugular vein at which all such boards aimed their recommendations was the domination and control of the courts-martial systems by command. All such boards concluded that amendments to the Articles of War and the Articles for the Government of the Navy which correct other inadequacies of military and naval justice, but which fail to check command control, effect only secondary reforms which become meaningless in the absence of the rooting out of the major sources of abuse and injustice. As to this, the Vanderbilt Committee said:

"The system of military justice laid down in the Manual for Courts Martial not infrequently broke down because of the denial to the courts of independence of action in many instances by the commanding officers who appointed the courts and reviewed their judgments; and who conceived it the duty of command to interfere for disciplinary purposes. Indeed, the general attitude is expressed by the maxim that discipline is a function of command. Undoubtedly, there was in many instances an honest conviction that since the appointing authority was responsible for the welfare and lives of his men, he also had the power to punish them, and consequently the courts appointed by him should carry out his will. We think that this attitude is completely wrong and subversive of morale, and that it is necessary to take steps to guard against the break-down of the system at this point by making such action contrary to the Articles of War or regulations and by protecting the courts from the influence of the officers who authorize and conduct the prosecution."

Implementing this finding, the Vanderbilt Committee recommended (*a*) the appointment of courts by the Judge Advocate General's Department, instead of by command; (*b*) the assignment of defense counsel by the Judge Advocate General's Department, and the requirement that defense counsel be a trained lawyer; and (*c*) that the intitial review of decisions, except for purposes of clemency, be in the hands of the Judge Advocate General's Department, instead of in the commanding officer who initiated the proceedings and convened the court. Corollary proposals provided that the officers in the Judge Advocate General's Department should be qualified lawyers insulated from the indirect influence of command by having their promotions, assignments, leaves, and fitness reports emanating from the Judge Advocate General's Department rather than from command.

It was felt that once command had filed its accusations and placed a man on trial, the judicial machinery should be in the hands of an independent judicial system within the service which, not subject to pressures and influence from command, would insure the accused the same fair trial by competent personnel that he would receive in our criminal courts if he were a civilian. In this recommendation and belief our association concurred, as well as the American Bar Association, the Association of the Bar of the City of New York, the War Veterans' Bar Association and many other veterans and bar groups.

On February 20, 1947, the War Department completely rejected these recommendations. The position of the Army with respect to them was summarized by Secretary of the Army Kenneth Royall in the Virginia Law Review for May 1947, where he said:

"The War Department feels that the committee received a rather exaggerated impression of the prevalence or seriousness of pressure exerted on courts-martial. However, there were doubtless instances where appointing authorities entirely misconceived their duties and functions and overstepped the bounds of propriety."

Extended hearings on the bills relating to the Army court-martial system were held by the House Committee on Armed Services, but no House hearings have been held on the Navy bills. No hearings at all have been held by the Senate committee. The House committee reported out H. R. 2575, introduced by Representative Elston of Ohio at the request of the Army, and this bill in amended form was passed by the House. In the closing days of the second session of the Eightieth Congress, the entire Elston bill was introduced by Senator Kem, of Missouri, as a rider to the Selective Service Act of 1948, and, without the benefit of any Senate hearings, was accepted by the Senate, and signed by the President as Public Law 759 of the Eightieth Congress. It becomes effective on February 1, 1949.

The passage of the Elston bill was hailed on the floor of Congress and in the press as the accomplishment of the reforms in military justice which had been sought by our association, among others. A label of "court-martial reform" was placed upon the bill which was scarcely indicative of its contents. Such labeling was highly dangerous in that it gave the public and the press the impression that substantial reforms had been accomplished, and thus reduced the possibility of further congressional action to effect the real reforms which are still lacking. Accordingly, it is important to make clear just what the Elston bill accomplished.

First of all, it must be noted that even such reforms as are affected by the Elston bill have no application to the Navy, the Marine Corps, the Coast Guard, and, probably, the Air Force. Just as the changes in military justice which were adopted in 1921 were restricted in their application to the Army, so the Elston bill is piecemeal legislation.

The most important phase of the Elston bill to our mind is such change as it has effected in the relation of command to the courts-martial systems. Such change is reflected by section 246 of the bill, amending section 8 of the National Defense Act (10 U. S. C. 61) to provide for a Judge Advocate General's Corps. This provides for a separate corps, headed by a major general and three brigadier generals, which shall have a strength of not less than 1½ percent of the authorized active commissioned officer strength of the Army, together with such warrant officers and enlisted personnel as may be assigned by the Secretary of the Army. This corps is given its own promotion list, similar to that of the Medical Corps and Chaplains Corps, independent of the line. This was vigorously opposed before Congress by the Army on the ground that thereby too great a preference was given to officers performing legal duties over line officers. It may be significant that the Army has not yet moved to put into operation this or other provisions of the Elston bill.

The establishment of such a corps, with its own promotion list, has been widely hailed as having established "an independent Judge Advocate General's Department," but this is far from the fact. As was said in an editorial appearing in the August 1948 issue of the American Bar Association Journal:

"The new statute accomplishes some desirable improvements in military justice, supplementing those which the Secretary had power to introduce by his own action, along lines recommended by the Vanderbilt Committee nominated by our association and appointed by the War Department. The Elston bill creates a Judge Advocate General's Department which is independent in the sense that it has authority to handle its own administrative matters, but, as has

been pointed out several times in these columns (33 A. B. A. J. 40, 45, Jan. 1947; 33 A. B. A. J. 319, Apr. 1947; 33 A. B. A. J. 898, Sept. 1947), command remains completely in control of the operation of the Army's courts-martial system."

Under the Elston bill the power to appoint courts remains in command. Under the Elston bill the power to review, in all its aspects, the decisions of courts martial remains in the commanding officer who convened the court. Under the Elston bill prosecutors and defense counsel are required to be members of the Judge Advocate General's Department or otherwise qualified lawyers only "if available"—a qualification which realistically leaves the situation in status quo. We believe that in all instances and in all the services, the prosecutor and defense counsel should be members of the Judge Advocate General's Department or otherwise qualified lawyers. So far as the basic fundamental matters at which the movement for court-martial reform has been aimed, little is accomplished by the Elston bill.

We have reviewed the history and background of these provisions to clear away the confusion that has been created as a result of the enactment of the Elston bill. We come now to our recommendations with respect to the position of command in the court-martial system.

We do not question that discipline is a proper concern of command, just as the commissions of crime in the civilian community is a concern of the executive authority, represented by the district attorney and the Governor. We believe that where a commanding officer has reason to believe that an individual has committed an offense, he must have the authority to file charges against that individual and to order him tried by a court of competent jurisdiction, and to be responsible for the prosecution of the offense, such responsibility including designation of a qualified prosecutor. We believe that it should continue to be the prerogative of command to evaluate the seriousness of the crime, and determine whether the case shall go before a general court martial, or a court with lesser powers of punishment. We further believe that, just as the civilian executive, the commanding officer should have the power of clemency.

But once the judicial proceedings have been placed in motion, we agree with the opinion expressed by Hamilton in No. 78 of the Federalist that "There is no liberty, if the power of judging be not separated from the legislative and executive powers."

We feel that, once the case has been referred by command for trial, the powers and control of command must end, save for the right to exercise clemency. Accordingly, we recommend that (1) the power of appointing the court, and the defense counsel must rest with the Judge Advocate General's Department; (2) that the personnel serving in such capacity must be free from the authority of command directly, or indirectly in matters of appointment, fitness reports, promotions, leaves, and so forth; and (3) that judicial reveiew of court-martial proceedings shall be in higher echelons of the Judge Advocate General's Department.

A practical problem of major proportions arises with respect to these recommendations. By law a Judge Advocate General's Department exists in the Regular Army, and the Judge Advocate General, as well as the other officers in the Department, are professional lawyers. Such is not the case in the naval services or in the Air Force.

While there is a Judge Advocate General of the Navy, neither he nor other officers performing legal duties are required to be lawyers. Traditionally, officers assigned to legal duties in the naval services are line officers whose tour of duty in the Judge Advocate General's office generally comes between other assignments.

If there is to be a real system of military or naval justice, it must be administered within each of the services by a corps of legal specialists from whom each Judge Advocate General shall be required to be appointed, and which will provide the law members of the courts, the prosecutors, and the defense counsel, all of whom ought to be trained lawyers. Such a corps is already established by law in the Army, but it has never existed in the Navy and the Air Force, since its division from the Army, has followed Navy practice in this regard.

Establishment of such a specialist corps in the Navy and in the Air Force is not such a departure from precedent as might be imagined. While the legal systems of those services are today administered by officers who, notwithstanding their distinguished records and high professional competence as line officers and aviators, are generally not trained and experienced in the technical duties assigned them, other specialist functions are performed only by specialists. The Bureau of Medicine and Surgery of the Navy and the Office of the Air Surgeon General are manned and headed by physicians and surgeons, who may not be so appointed

without a civilian license, and whose life work lies in medicine. The Dental Corps of the services are composed of dentists, and the Chaplains Corps are headed and manned by ordained ministers. There are doctors, dentists, and chaplains who are major-generals, rear admirals, and are accepted as an integral part of the service without ever having commanded a regiment or a naval vessel. In addition, as the result of the specialization which comes from modern warfare, in all services there are specialists such as communicators who are trained throughout their careers for a particular specialty. Only in the specialities of law and of intelligence has there been some hesitancy in providing for a specialist corps. Those two specialties have been largely considered as part-time jobs to which senior officers, regardless of their lack of professional training as lawyers or intelligence experts, may be assigned for a brief tour of duty, to return to sea or to aircraft after a few years.

The Navy has never seen fit to establish a legal corps, although in recent years it has taken tentative steps in this direction. During wartime it had a group of Reserve officers classified as legal specialists. Commendably, since the end of World War II it has sent a selected group of Regular Navy officers to first-line law schools for legal education, and has made such officers the nucleus of its postwar legal program.

If the Navy's hesitation to create such a legal corps stems from a desire, with which we could concur, to have its legal officers deeply imbued with its traditions and needs, the obstacle is not insurmountable. We would endorse a program which would insure that the Navy's lawyers have duty with fleet units, and be as cognizant of and sympathetic with the problems and requirements of the service as its general duty officers. Such has, in fact, been the history of medical officers, chaplains, and other specialists. We can see no reason why such a program would not be practicable with respect to legal specialists. But we are firmly convinced of the necessity in all services of having billets concerned with legal duties filled by trained and competent personnel. If there is to be any uniformity in the courts-martial systems of the various services, the professional lawyers of the Army must be balanced by professional opposite numbers in the Navy and in the Air Force. Accordingly, we recommend that amendments to the law be adopted providing for a truly independent legal corps within each of the services. The chiefs of such corps should be appointed from the corps, and not, as at present, from general duty officers. The assignments, leaves, promotions, and fitness reports of officers in such corps should emanate from their superiors within the corps, and the decisions of the courts on which they sit should be reviewed by higher echelons within the corps and not by command. To our mind, such provision is the basic need of military and naval justice. Once it is accomplished, other reforms become mere refinements.

The Elston bill largely restricts its application to general courts martial, and not special courts, which are the Army equivalents to summary courts martial in the Navy. It is our experience that the greater part of the abuses which have occurred in military and naval justice have occurred in Navy summary and Army special courts, rather than in general courts martial. This is to because the commanding officer who has convened the summary or special court does so not because he has any doubt as to the guilt of the accused, but because he feels that he cannot impose a sufficiently severe punishment at mast or company punishment. Frequently, this is conveyed to the court which the commanding officer appoints from his own command and whose decision he reviews. Too often the court is told that it is expected to find a verdict of guilty, and to impose a particular sentence, regardless of the oath that it takes "to well and truly try, without prejudice or partiality, the case now depending, according to the evidence which shall be adduced, the laws for the government of the Navy, and your own conscience." The result is that, although the court is by statute required to enter upon its duties with an open mind as to the guilt of the accused, its judgment is foreclosed in advance, and there is little question as to the ultimate result. This is much less likely to happen in a general court martial, which is not ordinarily convened by the commanding officer who has instituted the proceedings and is not subject to his control. General courts martial are normally under the control of a general or flag officer senior to the commanding officer who has initiated the proceedings, and the officers at his headquarters who participate in the proceeding are unlikely to be affected by the views of the subordinate commander who has recommended the court.

We are strongly of the opinion that all that we have said before as to the necessity of independent, competent lawyers serving as law members, prosecutors, and defense counsel on general courts martial is equally as applicable to Navy

summary and Army special courts martial. Those who oppose this find it particularly impracticable in the Navy, where commanding officers of smaller units and ships have the power to convene summary courts martial. Actually, however, a large percentage of such courts are convened on larger vessels such as battleships, cruisers, and aircraft carriers (all of which have several thousand personnel aboard) and on bases where there are many thousands of men. In such ships and on such bases there should be no difficulty about providing adequate legal specialists, just as other specialist officers are provided in the allowance list.

At first blush, it sounds convincing that smaller vessels such as landing craft, mine sweepers, destroyers, and other vessels which may have no more than half a dozen officers aboard cannot provide and cannot justify such legal specialists. If such smaller craft normally travelled alone, that might well be so. Normally, however, they travel and function in squadrons and divisions, each of which has a flagship aboard which is a squadron commander with a staff duplicating the staff of a fleet commander in miniature. There is no reason why legal specialists cannot be attached to such staffs as are other specialists, and be available for duties in all units of the squadron. We believe that any reform of military and naval justice will be incomplete if it is not applicable to the inferior courts, as well as the general courts, to the fullest extent practicable.

In the development of a uniform code for all the services, we recommend that a uniform terminology be adopted. Only confusion results from the fact that an Army special court is known to the Navy as a summary court martial; that an Army trial judge advocate may find as his opposite number a recorder. Adoption of a common terminology will do much toward the development of a uniform approach. Similarly, we recommend that uniform definitions of offenses, and a uniform system of punishments be adopted which will be applicable to all the services.

The Elston bill, in section 210, has made it possible to discipline an officer who has committed an offense by trying him at a special court martial, as well as at a general court martial. This is not as yet true in the Navy where the only punishment that can be meted out to an officer is trial by a general court martial or a private reprimand from his commanding officer. The effect of this is that where an officer commits a minor offense he in effect goes unpunished, although an enlisted man committing the same offense is subjected to punishment. Similarly, in the Navy as an administrative measure courts martial are cautioned against confining a petty officer, although a seaman committing an identical offense may and frequently does receive punishment of confinement. We believe that these practices negative our basic concept of equal justice under law, and we recommend that the law be amended so as to equalize punishments for all service personnel. Such a provision would improve morale and discipline.

The Elston bill has set up a comprehensive and tortuous system of review insofar as Army courts martial are concerned. That system is defective in that it preserves the right of review as to all phases of the case in the commanding officer who convened the court. This is completely at odds with American concepts of justice.

We recommend that a uniform system of review be established within all of the services, under which the commanding officer shall retain the right to review the case only for the purposes of exercising clemency. This, of course, parallels our civilian procedures under which the right of clemency is exercised by the President in Federal offenses, and by the Governor in State offenses. The initial review of the case as to legality and as to all aspects other than clemency should vest in the theater area or fleet representative of the Judge Advocate General. Thereafter, further review should be had by a Board of Review established in the office of the Judge Advocate General and appointed by him, as provided in the Elston bill.

Under present practice, in none of the services do the accused or his counsel participate as a matter of right in review of courts-martial decisions. They rarely file briefs, and rarely do they have an opportunity to argue their case on review. They have no knowledge of the questions that are being raised and discussed by the reviewing officers, and have no opportunity of presenting their point of view.

We recommended that the record of proceedings in any court martial shall include, when forwarded for review, a summary of all objections prepared by defense counsel, and that defense counsel be permitted to submit briefs or other argument to the reviewing authority. If the accused desires, at his own expense, to present oral argument through civilian counsel to the reviewing authority, he should be permitted to do so.

The goal of a uniform code uniformly applied and interpreted in all of the services is obviously difficult of achievement without some top-level coordinating agency. Ideally, when real unification of the military services is finally accomplished, there should be a single Judge Advocate General performing all legal duties for the Army, Navy, Air Force, Marine Corps, and Coast Guard. Unification as provided in the National Defense Act falls far short of the unification under which such ideal can be realized. We must gear our recommendations accordingly to the existing situation, and to the advances that are realistically possible.

Accordingly, we recommend that there be established a board of review in the office of the Secretary of Defense, which shall have final power of review in all court-martial cases in all the services, and which will be charged with the development of uniform practices and procedures, much as the Supreme Court of the United States controls the decisions of the Federal courts of appeals. The Secretary of Defense should have the further duty of closely supervising the operations of the various Judge Advocate General Departments, and should have the power of recommending legislation to the Congress and of issuing directives to the services in matters pertaining to military and naval justice. He should have the specific responsibility of advancing unification of the legal functions of the armed services.

Today our country has for the first time a peacetime draft. Large numbers of our young men will in the years ahead serve in a peacetime Army, Navy, and Air Force whose mission is the preservation of our American democracy. Under such circumstances it seems to us that there is a paramount obligation to those young men, to their anxious families, and to the basic principles of that American democracy to make full provision for the protection of those young men and to insure that their right to fair trials before qualified and independent courts is not impaired. We have every confidence that the adoption of the proposals made by us will strengthen the morale and discipline of our armed services, in time of war as well as in peacetime.

Respectfully submitted.

RICHARD H. WELS, *Chairman*,
LOUIS C. FIELAND.
JOHN M. MURTAGH.
SIDNEY A. WOLFE.
INZER B. WYATT.

Senator KEFAUVER. Colonel Hughes, president, Judge Advocate General Reserve Officers Association.

## STATEMENT OF WILLIAM J. HUGHES, JR., PRESIDENT, JUDGE ADVOCATES ASSOCIATION

Mr. HUGHES. I am president of the Judge Advocates Association, Senator, not of the Reserve Officers Association.

Senator KEFAUVER. We are glad to have you. We had your designation wrong on the list.

Mr. HUGHES. My name, for the record, is William J. Hughes, Jr. I am a practicing lawyer in Washington, D. C., and president of the Judge Advocates Association, which is an association composed of some 2,100 judge advocates in World War II, Army, Navy, and Air Forces; principally, however, Army and Air Forces.

Just by way of background, I was a member of the Regular Army and of the Judge Advocate General's Department in World War I, resigned in 1922.

At that time I was assistant to the Chief, Military Justice Division, and secretary to the Board of Review. We had only one board at that time.

I practiced law from 1922 to the outbreak of the present war, and went back into the Army shortly after Pearl Harbor.

I was again assigned to the Military Justice Division, became Assistant Chief, which position I held for most of the war, although I saw

service in various camps around the United States, and also in the Pacific.

The primary purpose of my being here is to give the committee the results of a questionnaire which, as president of our association, I sent to the various members of that association.

Under date of March 4, 1949, I sent a copy of the then pending bill, H. R. 2498, to the members of the association, and asked them to fill out a questionnaire which I enclosed with the bill, in which questionnaire I endeavored to summarize as best I could what seemed to me to be the dominant features of the bill.

I would like to submit to the committee the letter which I sent out, and also a copy of the questionnaire, and the tabulation of the results of that questionnaire. That is the letter and there are various copies of the questionnaire which the members of the committee may care to look at.

Senator KEFAUVER. Well, we would like to have it if we can get this in shape so that we can use it.

Mr. HUGHES. Those are five duplicate copies of the questionnaire with the tabulated results. The only thing pertinent in the letter is the bill.

Senator KEFAUVER. Colonel Hughes, your letter seems to be largely a reprint of the bill.

Mr. HUGHES. It simply encloses the bill. You see, members of the association did not have the bill, or I did not think they would, so I sent a copy of the bill along with it.

Senator KEFAUVER. Then, can we make exhibit 1 the front page of this pamphlet which is your letter?

Mr. HUGHES. I think that would be a good plan, Senator.

Mr. KEFAUVER. Then, following that, the questionnaire, following the responses you have.

(The documents referred to follow:)

JUDGE ADVOCATES ASSOCIATION,
*Washington, D. C., March 4, 1949.*

DEAR MEMBER: Identical bills, S. 857 and H. R. 2498, have been introduced in the Senate and House to establish a Uniform Code of Military Justice for the three services. Hearings will commence before a House Military Affairs Subcommittee March 7. In an effort to be helpful to the committee, and to express the viewpoint on our membership, we enclose a copy of the bill and ask you to fill out and return the following questionnaire.

Please note that there is a space at the end to expand your answer to any question, and for further comments or suggestions.

Thanking you for your advice and an early reply, I am,

With kindest regards,

WILLIAM J. HUGHES, Jr., *President.*

P. S.—In view of the importance and urgency of the enclosed proposed bill, the issuance of the March bulletin of the Judge Advocate Journal has been postponed until April. This has been done in order that our time and efforts may be devoted wholeheartedly to our consideration of this proposed legislation.

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QUESTIONNAIRE

1. Are you basically in favor of a uniform code for the three services? **Yes, 586; no, 51.**

2. If so, would you adopt it now, or, so far as the Army and Air Force are concerned, would you give the new court martial system established by the Elston Act, Public Law 759, 1948, effective February 1, 1949, and under which they are now operating, a reasonable try-out? Explain. **Two hundred and ninety-eight**

would adopt it now. Two hundred and twenty-one would give Elston Act trial first.

3. Do you believe, if a uniform military code is adopted, it should substantially depart from the principles of the Elston Act above referred to? Yes, 98; no, 434.

4. Proposed A. W. 2 (3) gives courts martial jurisdiction over Reserve personnel an inactive-duty training. Are you in favor of this? Yes, 211; no, 416.

5. Proposed A. W. 16, 26, 39, and 51 give the law officer the right to rule on interlocutory matters but deprive him of any vote on the findings and sentence, and exclude him from the deliberations of the court. Are you in favor of this? Yes, 85; no, 512.

6. Proposed A. W. 51c requires the instructions of the law officer as to the elements of the offense and the rule as to reasonable doubt to be made part of the record for appellate review. Will this be of practical value? Yes, 343; no, 179.

7. Proposed A. W. 7 permits a court of one armed force to try a member of another, but provides that appellate review shall reside in the armed force of which the accused is a member. Are you in favor of this? Yes, 330; no, 298.

8. Proposed A. W. 27*b* requires trial counsel and defense counsel to be lawyers. As the law officer must also be a lawyer (A. W. 26) and there are in peacetime around 100 Army general court martial jurisdictions, this will require at least 300 additional lawyers. Is this practicable? Yes, 445; no, 171.

9. Proposed A. W. 31 excludes a confession forced by military personnel but not one forced by outsiders such as police authorities. Do you think this adequately protects the privilege against self-incrimination? Yes, 74; no, 547.

10. Proposed A. W. 27 and 38 abolish trial judge advocates and substitute trial counsel. Are you in favor of this? Yes, 322; no, 232.

11. Proposed A. W. 58 permits confinement in the penitentiary for any offense no matter what the length of the sentence, by what court adjudged, and whether or not it includes dishonorable discharge. Are you in favor of this? Yes, 93; no, 540.

12. Proposed A. W. 66 provides for a board of review, who may be civilians, with final power, in ordinary cases, to hold records good or bad on any ground. In either event the Judge Advocate General has no power to do anything except refer the case to the Judicial Council, composed of three civilians. Are you in favor of this? Yes, 158; no, 468.

13. Proposed A. W. 66 gives the board of review final power to reduce sentences, with no review at all in the Judge Advocate General, the Judicial Council (see A. W. 67*d*), the Secretary, or anyone. Are you in favor of this? Yes, 118; no, 500.

14. Proposed A. W. 67 makes it mandatory that the Judicial Council (the supreme court of the new system) be composed of civilians only, appointed without the advice and consent of the Senate and holding office for no definite term, but solely at the will of the President. Are you in favor of this set-up? Yes, 67; no, 563.

15. The proposed code (A. W. 74) deprives the Judge Advocate General of all clemency powers now exercised by him under the present A. W. 51. Are you in favor of this? Yes, 52; no, 570.

16. The proposed code, in providing a disciplinary system without a responsible head, in depriving the Judge Advocate General of all power to differ with the board of review as to legality of records of trial (limiting him to the right to send the case to the all-civilian Judicial Council) and in making the board of review supreme as to sentences, appears to take the ultimate disciplinary control away from the military authorities and put it into the hands of civilians. Are you in favor of this? Yes, 93; no, 504.

17. Viewing the proposed code as a whole, do you think it sets up a workable system? Yes, 270; no, 291.

18. Have you had military justice experience while in the service? Yes, 598; no, 37.

19. Have you any other comment on any proposal in the code, or any suggestion as to what should be included therein?

Results: 2,190 sent out; 645 returned, signed; comments on 579.

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Mr. HUGHES. Twenty-nine hundred and ninety questionnaires were sent out, of which six hundred and forty-five and some additional ones which have come in since I made the tabulation were returned.

Senator KEFAUVER. Colonel Hughes, could you not consolidate the answers to this questionnaire?

Mr. HUGHES. All of them are alike. I am just giving you a number of different copies for the use of the various members of the committee.

Senator KEFAUVER. Thank you; that will be very useful.

Mr. HUGHES. It is interesting to note that of the 645 which were returned, there were comments written in, many of them reasoned comments, on 579, so that it seemed to me that the members of the association took the questionnaire seriously, and were at least interested in getting their views before the committee.

I take full responsibility for having framed these questions. It was impossible due to the time element to have the board of directors of the association pass on it, and I say that for the reason that some few answers to this questionnaire have commented on the framing of the questions, and some have said that they thought the questions were slanted one way or the other.

My only answer to that is that it is the best that could be done, and in any event, the difference of opinion shows that there could not have been any great slanting of the questions one way or the other.

The first question is:

Are you basically in favor of a uniform code for the three services?

Yes, 586; no, 51.

2. If so, would you adopt it now, or, so far as the Army and Air Force are concerned, would you give the new court-martial system established by the Elston Act, Public Law 759, 1948, effective February 1, 1949, and under which they are now operating a reasonable try-out? Explain.

There was a space left for an explanation, and many wrote in an explanation. The answers were, "Yes, adopt it now," 298; "Allow the Elston bill a trial first," 221.

3. Do you believe, if a uniform military code is adopted, it should substantially depart from the principles of the Elston Act above referred to?

Yes, 98; no, 434.

4. Proposed A. W. 2 (3) gives courts-martial jurisdiction over Reserve personnel on inactive duty training. Are you in favor of this?

Yes, 211; no, 416.

5. Proposed A. W. 16, 26, 39, and 51 give the law officer the right to rule on interlocutory matters but deprive him of any vote on the findings and sentence, and exclude him from the deliberations of the court. Are you in favor of this?

Yes, 85; no, 512.

6. Proposed A. W. 51*c* requires the instructions of the law officer as to the elements of the offense and the rule as to reasonable doubt to be made part of the record for appellate review. Will this be of practical value?

Yes, 343; no, 179.

7. Proposed A. W. 17 permits a court of one armed force to try a member of another, but provides that appellate review shall reside in the armed force of which the accused is a member. Are you in favor of this?

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9. Proposed A. W. 31 excludes a confession forced by military personnel but not one forced by outsiders such as police authorities. Do you think this adequately protects the privilege against self-incrimination?

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10. Proposed A. W. 27 and 38 abolish trial judge advocates and substitute trial counsel. Are you in favor of this?

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14. Proposed A. W. 67 makes it mandatory that the Judicial Council (the supreme court of the new system) be composed of civilians only, appointed without the advice and consent of the Senate and holding office for no definite term, but solely at the will of the President. Are you in favor of this set-up?

Yes, 67; no, 563.

15. The proposed code (A. W. 74) deprives the Judge Advocate General of all clemency powers now exercised by him under the present A. W. 51. Are you in favor of this?

Yes, 52; no, 570.

16. The proposed code, in providing a disciplinary system without a responsible head, in depriving the Judge Advocate General of all power to differ with board of review as to legality of records of trial (limiting him to the right to send the case to the all-civilian Judicial Council) and in making the board of review supreme as to sentences, appears to take ultimate disciplinary control away from the military authorities and put it into the hands of civilians. Are you in favor of this?

Yes, 93; no, 504.

17. Viewing the proposed code as a whole, do you think it sets up a workable system?

Yes, 270; no, 291.

18. Have you had military justice experience while in the service?

Yes, 598; no, 37.

19. Have you any other comment on any proposal in the code, or any suggestion as to what should be included therein?

In response to that, as I said, there were comments on 579 questionnaires, either written in on the questionnaire or by a separate letter.

Now, I have those questionnaires here. Due to the limit, I have been unable to take out those comments, but if the committee is interested, and would allow me to do it, I will take those comments and reduce

them to a consecutive form, and ask for a day or so within which to submit them to the committee.

Senator KEFAUVER. How much space would that take? How long would it be?

Mr. HUGHES. I would limit them to representative comments and I would say about 10 typewritten pages.

Of course, I cannot give them all in that space, but I can give the more reasoned comments. If the committee is interested, I will read some of them to the committee.

Senator KEFAUVER. That is all right, Colonel Hughes. Suppose you assimilate the comments and compile them in condition to be submitted to the committee, and so that the committee can understand them, and they will be filed following your statement.

Mr. HUGHES. Up to now I have been testifying as president of the association and giving the results of this questionnaire, but I would like to say a word in my own capacity as I am interested in it. and I have had some experience in the way it operates.

It strikes me that the primary objection to the present bill is that it civilianizes a thing that is basically noncivilian in character, namely, the discipline of the Army. It does this by toning down and minimizing the military control and exaggerating the civilian control.

Article 56 (b) states and gives notices to every soldier that the top power in courts martial is the Court of Military Appeals, and he has 30 days from the time he is notified of the decision of the board of review to petition the Court of Military Appeals for a grant of review.

In other words, he is told that in serious cases the discipline of the Army is in the hands of civilians, and no longer in the hands of the Army.

It matters not that the review by the Court of Military Appeals is limited to matters of law. As a matter of fact, he will interpret that simply as saying that the ultimate authority in the Army is a group of civilians.

Now, I think that is a fatal fault in psychology in so arranging things.

The committee has got to bear in mind that the system is primarily designed for war, and in time of war you get a cross section of the community, ranging all the way from mamma's boys to "tough eggs" who do not propose to obey anybody if they can help it.

It seems to me that the immediate job of the Army is to impress upon those new civilian recruits the fact that they are in surroundings wherein they have got to obey orders.

Now, to my mind the only way you can achieve that is by impressing them with the fact that they are up against, for the first time in their lives, rigid military discipline. In a sense it is a fear of the unknown which controls them. It is the old refrain "You're in the Army now," and that goes further to produce discipline in these new recruits, to my mind, than anything else.

On the other hand, if you give them the impression that the discipline is a civilian discipline, it seems to me that you render ineffective that dominant impression which they will get from the start.

The soldier is familiar with civilian discipline; he is not afraid of that. He knows that he can get lawyers, and he can delay things and time will pass on, and something will be done for him, and he is not worried about it.

On the other hand, he is definitely worried about military discipline, as such.

Now, it seems to me that in the future there will be more, rather than less, demands for the rigid military discipline that I refer to. So far untouched is the problem of atomic defense, for instance.

You are going to have in the near future to educate the American public. In all probability you will have to educate them in the necessity of evacuating, possibly, large segments of the population, and to do that you are going to have to utilize martial law to a certain extent. I hope it can be utilized as little as possible, but in any event, the nucleus for the control of the civilian population in that situation must come, it seems to me, from a disciplined Army; and that brings up the requirement of discipline.

So, it seems to me that at the present time when we have a very limited period of freedom from atomic difficulties, now is not the time to weaken, but now is the time, it strikes me, to strengthen rather than to attenuate the military aspects of discipline.

Anoher thing that has impressed me about this bill is the fact that in the House hearings, the working experts, the fellows who have operated this system, were not called as witnesses, namely, the Judge Advocate General of the Army or the Navy or the Air Forces.

It strikes me that their views on the thing should be obtained. Furthermore, the General Staff, so far as I know, has not been consulted on it. Whether they have made a staff study of it or not, I do not know, but above all those people, the real experts, are the generals out in the field.

The generals in control of armies during World War II and of air wings and the Navy admirals in control of fleets, they are the people who know what makes discipline operate. They are the people who know conversely why it does not operate, and it seems to me that they are the people——

Senator KEFAUVER. Well, Colonel Hughes, for your information we are going to hear the Judge Advocates General of the services this afternoon.

Mr. HUGHES. That is fine.

The last thing I would like to suggest, and a number of the replies to the questionnaires single it out for attention, is the fact that the present bill tones down the activities of the Judge Advocates General of the three services to the point where they are practically nonexistent; whereas under the present Elston Act, the Judge Advocate General is given certain affirmative duties. He has either got to concur or assent, and his affirmative participation in the system is necessary.

Furthermore, he is given certain clemency powers under that bill which he is not given now.

The present bill simply gives him the opportunity to be one of the devisees of clemency power if the Secretaries of the respective services choose to give it to him.

Now, most of the members of our association who have commented on it have come to the conclusion that that is wrong. The Judge Advocate General is the fellow who ought to have the primary control of the system. He is there, he is somebody you can make responsible, and his participation should be maintained, at least, on the level of the present Elston Act, which probably takes a median ground be-

tween depriving him of all authorities and giving him complete authorities.

So, on that basis, I would like to submit the résumé which I spoke of a few moments ago.

Senator KEFAUVER. We would be glad to have it. Can you do that within 2 or 3 days?

Mr. HUGHES. Thank you, Senator; I will.

Senator KEFAUVER. Any questions?

Senator MORSE. Just one question. Colonel, in following the course of your argument, would you or would you not reject the recommendation that the power of the command officer be reduced insofar as the appointment of the court and prosecutor and so on are concerned?

Mr. HUGHES. I would like the situation as it is now constituted by the Elston Act. I think that is just about the right control.

Senator MORSE. That is all.

Senator KEFAUVER. Thank you, Colonel Hughes.

Mr. HUGHES. Thank you.

(The information referred to previously follows:)

The Judge Advocates Association sent copies of H. R. 2498, S. 857, together with the following questionnaire to its 2,200 members, 645 questionnaires were returned. A tabulation of the results is here set forth:

QUESTIONNAIRE

1. Are you basically in favor of a uniform code for the three services? Yes, 586; no, 51.

2. If so, would you adopt it now, or so far as the Army and Air Force are concerned, would you give the new court martial system established by the Elston Act, Public Law 759, 1948, effective February 1, 1949, and under which they are now operating, a reasonable try-out? Explain. Adopt uniform code now, 298; try Elston Act first, 221.

3. Do you believe, if a uniform military code is accepted, it should substantially depart from the principles of the Elston Act above referred to? Yes, 98; no, 434.

4. Proposed A. W. 2 (3) gives court-martial jurisdiction over reserve personnel on inactive duty training. Are you in favor of this? Yes, 211; no, 416.

5. Proposed A. W. 16, 26, 39, and 51 give the law officer the right to rule on interlocutory matters but deprive him of any vote on the findings and sentence, and exclude him from the deliberations of the Court. Are you in favor of this? Yes, 85; no, 512.

6. Proposed A. W. 51c requires the instructions of the law officer as to the elements of the offense and the rule as to reasonable doubt to be made part of the record for appellate review. Will this be of practical value? Yes, 343; no, 179.

7. Proposed A. W. 17 permits a court of one armed force to try a member of another, but provides that appellate review shall reside in the armed force of which the accused is a member. Are you in favor of this? Yes, 330; no, 298.

8. Proposed A. W. 27b requires trial counsel and defense counsel to be lawyers. As the law officer must also be a lawyer (A. W. 26) and there are in peacetime around 100 Army general-court-martial jurisdictions, this will require at least 300 additional lawyers. Is this practicable? Yes, 445; no, 171.

9. Proposed A. W. 31 excludes a confession forced by military personnel but not one forced by outsiders such as police authorities. Do you think this adequately protects the privilege against self-incrimination? Yes, 74; no, 547.

10. Proposed A. W. 27 and 38 abolish trial judge advocates and substitute trial counsel. Are you in favor of this? Yes, 322; no, 232.

11. Proposed A. W. 58 permits confinement in the penitentiary for any offense no matter what the length of the sentence, by what court adjudged, and whether or not it includes dishonorable discharge. Are you in favor of this? Yes, 93; no, 540.

12. Proposed A. W. 66 provides for a board of review, who may be civilians, with final power, in ordinary cases, to hold records good or bad on any ground.

In either event the Judge Advocate General has no power to do anything except refer the case to the Judicial Council, composed of three civilians. Are you in favor of this? Yes, 158; no, 468.

13. Proposed A. W. 66 gives the board of review final power to reduce sentences, with no review at all in the Judge Advocate General, the Judicial Council (see A. W. 67d), the Secretary or anyone. Are you in favor of this? Yes, 118; no, 500.

14. Proposed A. W. 67 makes it mandatory that the Judicial Council (the Supreme Court of the new system) be composed of civilians only, appointed without the advice and consent of the Senate and holding office for no definite term, but solely at the will of the President. Are you in favor of this set-up? Yes, 67; no, 563.

15. The proposed code (A. W. 74) deprives the Judge Advocate General of all clemency powers now exercised by him under the present A. W. 51. Are you in favor of this? Yes, 52; no, 570.

16. The proposed code, in providing a disciplinary system without a responsible head, in depriving the Judge Advocate General of all power to differ with board of review as to legality of records of trial (limiting him to the right to send the case to the all-civilian Judicial Council) and in making the board of review supreme as to sentences, appears to take ultimate disciplinary control away from the military authorities and put it into the hands of civilians. Are you in favor of this? Yes, 93; no, 504.

17. Viewing the proposed code as a whole, do you think it sets up a workable system? Yes, 270; no, 291.

18. Have you had military justice experience while in the service? Yes, 598; no, 37.

COMMENTS FROM MEMBERS OF JUDGE ADVOCATES ASSOCIATION ON QUESTIONNAIRES

NO CIVILIAN CONTROL

I believe the tendency of postwar-reform efforts has been to go too far in taking ultimate control in military justice from the military and placing it in civilian hands. Discipline is still absolutely essential to military effectiveness and I believe the military authorities should remain in control of military-justice administration with a minimum of restriction necessary to prevent injustice.

The Judge Advocate General should be given more authority and responsibility instead of less. There is no place for civilians in military-justice procedure. If we get our military justice and civil justice mixed up we have no military discipline. Military justice is a means instead of an end anyway. It's too bad we have to have it at all and if we ever have lasting world peace we can abolish it all. But until we reach that state of security let's keep our military establishments military and not let them get mixed up with lofty concepts of democracy. Let's just admit that the military can't do as good a job of justice as the civil authorities, but the military can do a better job of fighting and since military justice is a necessary part of the fighting machine we will have to keep it. I recommend more cooperation, more simplicity, less competition between the services and that the national welfare be substituted for individual ambition.

We have gone about far enough in protecting the basic rights of an accused. We must retain some authority in the military, who knows its problems best, or we will lose all control over the personnel. We will end up being busier protecting individual rights than fighting the enemy.

Any attempt to put the CM system on a par with the civilian's concept of justice is going to react very unfavorably in the efficiency of the services and arms involved. I believe that the services are no more than the name implies—arms and services; they are the good right arm of the Executive, and their mission must not be hindered in its performance by a mistaken emphasis upon individual justice. The individual is entitled to justice, certainly, and the Elston Act gives it to him. This new code, however, makes the administration of military justice so cumbersome that it places justice ahead of the mission of the service involved. The enemy, we may be certain, will not be so encumbered, if and when we engage him.

Generally speaking, the proposed code is contrary to military principles. If we want civilians to run the judicial side of the services, then we should use our regular civilian procedures. Obviously this is too slow and cumbersome. In

my opinion the proposed changes would completely destroy our present system of military justice and would seriously imperil the discipine of the various commands. Such changes should bt most strenuously opposed.

The power to command must remain with the military forces if we expect to have an efficient and well-disciplined military. The power to command depends upon discipline, discipline depends upon the power to punish. If we take the power to punish away from the military we will destroy discipline, and eventually the power to command. The proposed code, except for minor offenses, takes away from the military the power to punish, and vests it in a civilian board of review, which will have dictatorial power over valid and legal sentences of courts martial.

The sob sisters seem to be placing us in a position where military law and rules will be as ineffective as our civilian rules against traitors.

My only concern is for an armed force with appropriate discipline. I will not vote to turn over our armed-forces discipline to a group of unmilitary, undisciplined cry babies, for this will create the mob the USSR wants us to have for an armed force.

There is an unnecessary emphasis on civilian influence—to such an extent that it is a misnomer to call it a code of military justice. With all the additional safeguards that have been provided by the Elston Act, I see no need for the tremendous civilian authority interjected into the proposed system.

This is a code obviously drawn by some fuddy-duddy who never saw a day in the field with troops and certainly no combat, and resembles Federal district and appellate court procedure—too technical to work. Of what possible disciplinary value could a sentence have with the four reviews (causing a year's delay) to intervene? Especially in a mutinous situation in a far-off field? What experience in war would qualify civilians to judge military officers as a supreme judicial council? Who controls promotions, efficiency reports, etc., of judge advocates and board of review members?

I feel, after examining the proposed bills in the Senate and the House, that a Uniform Code of Military Justice for the three services is greatly needed and would be for the mutual benefit of all concerned. However, the proposed bill is not what is needed. It attempts to make military justice civil justice, and such is absolutely not feasible. Civil law and military law have a different aim in view. A soldier is not a civilian and a civilian is not a soldier, and never the twain shall meet.

Civilians—particularly those legislators without military experience—should some day realize that when they try to deprive the military of those disciplinary powers which rightly and peculiarly belong to the military, the system evolved will not be successful.

The code gives every evidence of preparation by a person or persons who are attached to the "adversary" system and have little appreciation of its deficiencies, It would destroy some of the most outstanding merits of military justice as compared with criminal justice in general. It represents a retrograde movement from the advanced position reached under the Articles of War. I believe it would prove unworkable and harmful to the State and the Army in time of war. It not only is not an improvement; it would be highly dangerous to the public interest if enacted.

I see no reason for further interference by Congress in the matter of military justice. I have always believed and do now, that most of the so-called safeguards which are set up in the Articles of War are really so only to the poor soldier, the man who either makes no effort to do right or who deliberately does wrong. Thus they discriminate against the good soldier who tries to perform his whole duty. The idea of turning any part of military justice over to civilians is repugnant to all principles of discipline. If those men are competent to take charge of the most important feature of an army, its discipline, then they should be made generals.

The system embodied in the proposed code would prove to be cumbersome in practice. If it should be enacted into law and a national emergency should occur, it is possible that the whole system of military justice would break down. Many people fail to realize that military justice is a field within itself and that the rules applicable to civilian practice are not always precedents. The fact is

that the former Articles of War on the whole constituted a fair sysetem. It was the human element rather than the system which gave rise to the abuses in the last war. The real remedy is to be found in the proper orientation of officers, particularly general officers, rather than attempting to increase participation by civilian elements in the administration of military justice.

I cannot take time to examine the matter fully. However, no code should lose sight of the fact that discipline is and must be the primary object. Civilian considerations of presumed innocence must sometimes give way to the exigencies of war just as civilian considerations of personal comfort and independence must also give way. The system must not be weak and it must not be cumbersome. Justice above all must be prompt. Provisions to insure fairness must not be the counsel of perfection, but they can be adequate without interfering with the main object which is to win a war. A peacetime army, to be of value, must be mentally adjusted to wartime necessities. It has to be the cadre and pass its philosophy to the new recruit. It can't do that on a basis of diverse disciplinary responsibility in time of war if a "soft" counsel. Appointment should be from candidates proposed by Army, Air Force, and Navy.

I am violently opposed to inserting civilian personnel into our system. The military system has more protections for an accused than does any other system of justice of which I know. If the military cannot conduct its own system of justice, based on laws passed by the Congress, I don't see how it can be given the job of protecting this Nation from aggression. Let's give the new system a trial. I believe it will work more efficiently, and with more justice to an accused, than do any of our civilian tribunals.

The main defect is the lack of service control, by reason of the civilian (and political) Judicial Council. This Council should be service personnel, or if civilians are desirable, then composed of a board of 5—2 civilians and 3 appointed from the respective services.

In my opinion, a civilian board should not have final review. Unless they have military background they cannot know problems of military essential to proper review. As a division judge advocate for 5 years I feel that concepts of civilian procedure must give way to military expediency at a final point.

Civilians with no military service do not know problems of armed service. Even limited experience is insufficient.

I particularly object to placing ultimate supervision and control in civilian hands. There is no discipline better than self-discipline. The military (or naval) problem is sufficiently unique to warrant letting each discipline itself. There seems to me to be no excuse for conceding that these services must abandon time-honored practices and customs in favor of novel ones that in effect imply that the Army, Navy, and Air Force personnel are ultimately incompetent to administer justice to their own.

I say, give the Judge Advocate's Corps (and the corresponding sections of the other services) sufficient personnel, qualified to properly administer justice at the trial level, leave them with a system as good as that provided by the Elston Act, and far better results will be obtained than by the proposed novel system.

I cannot understand nor accept the idea of appointing civilians to the all-important position of being a "supreme court" for the armed forces, unless it is desired to create some "patronage." My reaction to such idea is: Same is a reflection on the personnel of the various services, particularly the Judge Advocate General's Department of the various branches of the service. It almost amounts to an expression of lack of confidence in such personnel, and seriously questions the caliber and integrity of such personnel. Under no circumstances would I endorse or support such a proposal. If there must be a "supreme court," then the members of same should be drawn in equal numbers from the Army, Navy, and Air Force.

I particularly object to reviews by civilian boards. I believe that officers with general court-martial jurisdiction approved dishonorable discharges only when clearly justified. I do not favor having civilians review the type of discharge given in time of war. The War Department through the judge advocate's office offers the best protection for the civil rights of our young men. It is nonpolitical. It has no interest except to administer justice.

My principal objection is to civilian board of review, and machinery and provisions regarding their tenure and power. If the whole proceeding is to be subject to a civilian board I think the make-up of the board should include someone who has served in armed forces and someone who has legal training. Otherwise it would be like making a Supreme Court decision reviewable by a coroner's jury.

Question 16 puts its finger on the crux of the entire problem since the agitation for a new code is primarily an attempt toward the "Taking away of ultimate disciplinary control" from military authorities. It seems to me that such expressions should be avoided in discussing these problems with congressional representatives. Courts martial are only one means of exercising disciplinary control. I even doubt if it can properly be said that because the Judicial Council was composed of civilians, that ultimate disciplinary control would be completely lost to the services except in very few cases, comparatively speaking. Permitting the boards of review to be composed of civilians is another matter. These should be officers of the services for the reasons already set forth in paragraph 9 hereof. These reasons appear to be a far better argument against appointing civilians than the "losing of ultimate disciplinary control," and more likely to be listened to and understood.

CIVILIAN REVIEW DESIRABLE

I see considerable merit in some civilian participation.

Civilian review at the top seems desirable. Persons with long military experience tend to think in terms of "discipline." Punishment for disciplinary reasons is not always just. The Judge Advocate General has enough administrative duties.

I served both as assistant staff judge advocate and staff judge advocate during World War II, also trial judge advocate and law member. While I happened to serve under a commanding officer who used common sense I know that others were not so fortunate. I therefore believe that justice would be better served by leaving the ultimate power in the hands of civilian body whose justice would not be colored by military precepts.

I would make the system more judicial (i. e. run by lawyers as courts) and less military (i. e. less by direction of line officer as an instrument of policy or whim). Our military services are now composed of a broad cross-section of our population and will be at least for some years. Some of these persons will not be serving voluntarily, that is, they will be selectees. For these reasons we need a broadened Code of Military Justice with all the safeguards and protections that a citizen receives in civilian life in his courts of law. Our courts martial must not be subject to criticism for harshness, lack of deliberation, lack of qualification of counsel and law member, inadequate appeal, etc.

The uniform code appears to me to have some features that are of particular value. There is no doubt in my mind that isolationists, pacifists, opponents of preparedness, propagandists against our form of government, and even many sincere individuals who are interested only in the welfare of the Nation, have unjustifiably used the administration of military justice to bolster their contentions. If the ultimate power in court-martial cases is vested in a Judicial Council composed of civilians with proper qualifications, I feel that these protestants or opponents will be deprived of their main argument. They will not be able to criticize the Army or any other armed force for the conclusions reached by judges in no way under the control or influence of the armed forces.

Ultimate recourse should be civilian, because the ultimate government and ultimate law of the land are civilian. Soldiers, as such, do not lose their citizenship. Citizenship is a civilian capacity and should not be impaired with ultimate civilian supervision.

I do not share the fear implied in question 16 that the disciplinary control is being taken away from the military. The board of review is appointed by the Judge Advocate General from officers or civilians; I imagine it will usually be a board of officers. If it isn't, it is the Judge Advocate General's fault. The Judicial Council's review is limited to matters of law (art. 67d), and on law matters I am in favor of having a review by civilians.

I spent approximately 2 years in military justice work in Europe. I became convinced that choice between military and civilian influence in military justice is a choice between two alternatives neither of which is entirely satisfactory. It was my own experience that the military influence should be excluded. I think the gravity of the offense, its special seriousness in a particular case, its significance to the military commander should be shown after guilt is established and before sentence is pronounced. For the rest, I would rely on civilians.

I go further than any of the present proposals. Military justice should be handled as a quasi-civilian function with the same guaranties. There is no reason why the civilian soldier in the Army against his will should be subjected to any atrophied or hyphenated system of justice except when required by the tactical presence of the enemy forces. In that event commanders should be limited to referring the offender to a civilian agency which would accompany the Army in the field and give prompt justice on the spot. We spare no expense or thought taking care of the physical needs of our soldiers. Why cannot we display the same ingenuity and zeal in furnishing them with a system of precise justice rather than the primitive system incorporated in the Elston Act or the proposals of the uniform code? I am for the uniform code even though it is a single, faltering, inadequate step—yet it is a movement in the right direction.

PRESERVE POWERS OF THE JUDGE ADVOCATE GENERAL

Am in favor of the changes made in trial procedure and make-up of court and counsel but oppose system of civilian review as an absolute. Think that board of review should be subject to some control by the Judge Advocate General.

The administration and appellate review of military justice should be retained under the control and jurisdiction of the Judge Advocate General. The administration of military justice involves more than the punishment of an accused in the light of civil administration procedures. Inasmuch as it affects discipline and morale in the service, which can be best coped with by individuals serving full time with the men in the service.

Question 17: I believe that the system is workable. However, I am not in favor of placing the appellate jurisdiction out of the Judge Advocate General's Department.

It is my opinion that the personnel of the board of review and of the Supreme Court should be members of Regular Army or Reserves always, and that they should be attorneys. Retired officers should be made available.

The efforts of Articles of War 66, 67, etc., are a step in the right direction, but they go too far. The same benefits could be accomplished by making a final review, together with clemency, etc., the power of the Judge Advocate General. His knowledge of military necessity, through experience and training would be the tempering factor, but he in his department definitely should be divorced from all responsibility to any other part or personnel of the military system, even as pertains to influencing factors.

The Judge Advocate General's Department should be constituted as a part of the Department of Defense with over-all direction and appellate review for all services. If uniformity is desirable then there should be a unifying point at the top. Personnel should come from the most able of all three services.

If a Judicial Council is to be adopted, it is suggested that it consist of five or seven members: One member from the Army; one member from the Navy; and one member from the Air Force; and the balance, civilian members.

I believe that the general court should be appointed by the Judge Advocate General rather than the military commander.

TRIAL JUDGE ADVOCATE GENERAL'S POWERS SHOULD BE STRENGTHENED, NOT WEAKENED

Military justice is the primary business of the Judge Advocate General and his position in this matter should never be weakened in any way, shape, or form whatever.

I am now and always have been against a uniform code for the three services. It takes the powers away from the Judge Advocate General making him a figurehead of the department. It will create too much confusion in the appellate branch. I believe the Army has sufficient qualified personnel to handle its justice department, and not leave it in the hands of civilians.

The Judge Advocate General should not be "pushed out of the picture" like he has. I do not think such unqualified and unrestricted judicial power should be granted civilians. Military men understand military justice more than a civilian could ever comprehend.

The Judicial Council idea is fine, but there should be more on it. The power of the Judge Advocate General should not be reduced. Certainly final clemency action should not rest alone with board of review.

The proposed code weakens, rather than strengthens, the Judge Advocate General's Department. It reduces the Judge Advocate General to a purely administrative officer and takes from him all judicial functions and all opportunity for mitigation, reduction, or suspension of sentences. This, in my opinion, is not desirable.

It provides for a civilian Judicial Council possessing the powers of a Supreme Court. This not only serves no useful purpose, but is a definitely hampering appendage. It is subject to the same objection as stated in the previous answer and in addition serves only to delay and make cumbersome the administration of military justice. It is a useless, wasteful, cumbersome appendage, and should be dispensed with.

I believe that a larger and more complete Judge Advocate General Department during the last war would have done much to eliminate many of the injustices. The Judge Advocate General Department should be operational in lower levels of command and should be the sole administrator of justice. This would require more members and thus more lawyers. Why not include in the new code that all qualified lawyers be commissioned directly into the Judge Advocate General Department and assigned only Judge Advocate General Department duties in the same way that doctors and dentists are commissioned and assigned to Medical and Dental Corps. Why have lawyers driving trucks when there is such a dearth of legal personnel?

As the Judge Advocate General Department is generally charged with the administration of military justice and procedures thereunder, it would appear that the Judge Advocate General's authority should supersede that of any civilian council or personnel in the administration and enforcement of the proposed code.

Naturally I am opposed to this section (A. W. 74). I believe the Judge Advocate General should have his powers of clemency increased rather than decreased. Such powers have never been abused. The powers of clemency of the Advocate General should be given to the Judge Advocate General insofar as possible.

This section seems unreasonable. There must be a responsible head for any disciplinary system and it has always been the Judge Advocate General. I am not in favor of this section as it now stands but I do believe there should be some check on reviews so that we will not be met with the criticism of civilian courts of appeal in which opinions are "Affirmed, no opinion."

The proposal appears to ignore the value of an integrated group, such as the Judge Advocate General Department, to run the military justice system. I doubt seriously that a three-man civilian "Supreme court" will be an adequate substitute though I am in sympathy with the general idea particularly in the event of mobilization of our "civilian army." I would propose an amalgamation of the two ideas.

In reference to questions 12, 13, 14, and 15, it is believed that so many questions which are unique to the service that men with some military training should handle or participate in review as a court. Further, civilians are likely to be as responsive to public pressure as officers of the service are to pressure from within the service. It seems risky to relieve the Judge Advocate General of his authority of review as a court.

I am in favor of the Judge Advocate General retaining most of the powers given him by the law now in effect.

Proposed system would weaken the Judge Advocate General, superimpose an agency entirely out of military channels and one which does not have the checks upon it presently prevailing in the case of Federal judges and other appointees in positions of less responsibility and power than in the proposed positions.

I do not favor the civilian personnel of having any jurisdiction over the military in the administration of military justice. It is my confirmed belief that the Judge Advocate General should always exercise clemency powers, and that military boards, courts, and jurisdiction should never be relinquished to civilian in any way or form if the high, just, and efficient administration of military or naval justice is to be maintained, all for the best interest of discipline of the members of the services or armed forces. The administration of military justice is to my mind integral to the military establishments alone.

I am opposed to civilians participating in any way in a court martial. This is an affront to the Judge Advocate General's Department. The Judge Advocate General should be the last word in all appeals, except by intervention of the Secretary of War and the President. The Judge Advocate General should be a separate command responsible only to the Secretary of War and the President.

The proposed code injects many needed amendments from a civil standpoint, but it fails to take in consideration that military justice must have the elements of the military, otherwise it will fail completely. I dislike the failure to have the Judge Advocate General as the responsible head of this system and feel civilians ought not be on the council. Civilians are not acquainted with the Army or services. The proposed new code is just a mess.

The proposed board of review, as is now the case, is to be constituted by Trial Judge Advocate General in his office. It should, therefore, function as part of his office and be composed entirely of military personnel. It should act more in an advisory capacity, with the power to take action on its findings and recommendations resting in Trial Judge Advocate General. On the legality of records, but not clemency, if Trial Judge Advocate General does not concur with board of review, the matter should go to the judicial council for decision, if it would not otherwise have to anyway.

While code seems to establish a workable system, the method of review should be changed to give more power to Judge Advocate General, and less to board of reviews. Judicial council is good innovation if members appointed for 5-year terms with advice of Senate.

### IF TOP POSITIONS ARE FOR CIVILIANS, NO INCENTIVE TO MILITARY LAWYERS

If the top judicial positions are not open to military personnel, the present difficulty in securing and retaining competent lawyers in the Judge Advocate General Corps will be aggravated.

While in service, I had a wide and varied experience in military justice, i. e., staff judge advocate, trial judge advocate, and defense counsel in many cases of charges against officers and enlisted men. I was a law member in more than 500 general court-martial cases, without one single reversal or criticism by the reviewing authority. It is my opinion that the Uniform Code of Military Justice (H. R. 2498) as proposed, is a dangerous instrument; that it certainly does not adequately protect the substantive rights of the accused; that it provides for ways and means to inflict undue, harsh, and inhuman sentences or penalties and it is a glaring insult and personal stab not only to the legal profession, but to every member of the Judge Advocate General Corps, from top to bottom. Should this bill become law, every officer, both Regular and Reserve, should seek transfer to another branch or arm, and if this could not be accomplished, resign their commissions. Congress would never attempt to place civilians over the Medical Corps, Engineers, or Chemical Services.

### SHOULD BE ONLY ONE TRIAL JUDGE ADVOCATE GENERAL

Why cannot there be one Judge Advocate General? I perceive no reason, if unification is to receive no more than lip service, for a uniform code unless it is to be uniformly administered. In my opinion, that cannot be done with several Judge Advocate Generals.

The establishment of this supreme Judge Advocate General's Department would enable the uniform maintenance and operation of military justice procedure as well as the training of personnel to function in the respective branches. The judicial council could then operate as a part of such department under the new Judge Advocate General and should be advisory to the general.

With reference to 17, the system might work, but I question the effect on maintenance of discipline. The position of the Judge Advocate General should not be weakened. As his should be the responsibility of the operation and effect of military justice in his branch, he should have the powers appurtenant to such responsibility. Otherwise a supreme Judge Advocate General's Department should be created supervising military justice over all branches of the armed services.

The main objective is that of separation of functions of military justice from command and to obtain administration thereof on a uniform basis throughout the services by an integrated independent Judge Advocate General.

Should be only one Judge Advocate Corps, not three.

JUDICIAL COUNCIL SHOULD BE COMPOSED OF THREE JUDGE ADVOCATES GENERAL

In my opinion the logical head of any uniform code for all the armed forces is the Secretary of Defense, and that he should have ultimate and final decision in all matters which do not require confirmation by the President. (I mean, of course, all matters which have to go beyond the initial reviewing agencies.) My suggestion is that the Judical Council should consist of the Judge Advocates General of the Army, Navy, and Air Force. As before indicated, I do not think the Coast Guard should come under the military code except when it is attached to the Navy. Let the general counsel of the Treasury Department administer justice for the Coast Guard (see proposed art. 1 (4)) under their present laws, until they come under the Navy, then the Secretary of the Navy can take care of them. The plan I have outlined here is more or less a "snap" proposition on my part, but it seems to me that the Judge Advocates General of the three armed forces, each of which is responsible for the administration of military justice in his department, constitute the logical tribunal to sit in judgment for all, under the Secretary of Defense.

THE JUDGE ADVOCATE GENERAL SHOULD ASSIGN JUDGE ADVOCATE GENERAL DEPARTMENT PERSONNEL

Under the old law assignment of judge-advocate officers was by the Judge Advocate General. Under the new bill assignment is by G–1 with approval of the Judge Advocate General. This is a bad change.

It is also my conviction that members of the Judge Advocate General's Corps should be completely removed from the influence and control of the commanding officer to the same extent as are officers of the Medical Corps.

THE JUDGE ADVOCATE GENERAL DEPARTMENT SHOULD SELECT COURTS

Take the selection of personnel to comprise all types of courts martial from command and place it under the officers of the Judge Advocate General's Department and you will remove a good portion of the complaints. Have the Judge Advocate General's Department select personnel with no influence by command and most of the enlisted personnel will have more confidence in the system. In other words, separate your executive and judicial branches.

ONLY THE JUDGE ADVOCATE GENERAL SHOULD RATE JUDGE ADVOCATE GENERAL DEPARTMENT OFFICERS

The commanding officer should never have power to rate a staff judge advocate. One of my commanding generals gave me two very satisfactory ratings and put me out of the Army on War Department Circular 485 (1944's), simply because I said "No" to him. My previous ratings, my general court-martial record and recommendation for promotion were all ignored because of his personal displeasure. This condition should not be tolerated. I'd be willing to be rated on my professional record by the Judge Advocate General. Staff judge advocate for a sadistic commander is the "hottest" job in the Army, now.

UNIFORM CODE DESIRABLE

I am not in favor of certain proposals of this uniform code. I am convinced, however, that the need for such a code is so great that it is better to accept the code "as is" if necessary, rather than risk the defeat of the proposal attempting to iron out all of its details. I strongly urge that our association lend its hearty support to the approval of the measure.

TRY ELSTON ACT FIRST

I think there is nothing substantially wrong with the present Articles of War and court-martial procedure. Whatever mistakes were made during World War II were due almost entirely to faulty administration by untrained personnel due to the rapid expansion.

Personally I am in favor of the Elston Act and against this new so-called uniform code. It is quite obviously a part of the "drive" to amalgamate the Army, the Navy, and the Air Force. Amalgamate them first (if that can be done) and then talk about a uniform code, but meanwhile don't monkey with the administration of military and, or, naval justice.

Having participated in one capacity or another (trial judge advocate, law member, or reviewing the case for the reviewing authority) in over 200 general court martial cases, I believe that the old system worked much better than most people believe. Changes were necessary, but it is my opinion that much was accomplished by the Elston Act, and that improvement should come gradually. Too much change is likely to lead to confusion, especially if the change comes too rapidly. Perhaps in time there should be a uniform code, but I don't believe there is any real necessity for it yet, and I don't feel that the one proposed is the one that should be accepted if one is. A study of the proposed code leads me to believe that the matter should have a great deal more study.

In my opinion, it is much too early to attempt to work out a uniform code for the three services. Give Public Law 759 a chance for a few years; many of its provisions are good; many may, in the light of experience, have to be dropped.

I am afraid many of our Congressmen are losing sight of the fact that the basic aim of military justice is to promote discipline for the furtherance of the war effort in time of conflict and not to provide a substitute for civilian courts.

In view of all of the work in preparing the present Manual for Courts Martial, and in view of the fact that there is no immediate emergency or reason for speed in making further radical changes, it seems much more sensible to try this out before making further extensive changes. Furthermore, the Congress should be made to realize that the Army court-martial system is not entirely comparable with other judicial systems and should not build up a cumbersome complicated court system, especially in these days when we are trying to simplify court procedure; the primary purpose of courts martial being to maintain discipline. A system which would weaken the discipline of the armed forces might be disastrous, especially in time of war.

I favor proceeding with the 1949 manual and making changes slowly from experience. I favor civilian participation, but not to the exclusion of the military. It should be joint participation. Let us try the changes effective February 1, 1949, and work from them toward more changes as deemed necessary.

Until provisions of the Elston Act have been worked with for a reasonable length of time, there is no justification for a so-called uniform code. In attempting to correct injustices in the old system of military justice, it is very easy to swing too far in the other direction.

1. The art of a good code is the possible and the workable, not the ideal. Such, I believe, has been the Manual for Courts Martial, 1928, and such is the Manual for Courts Martial, 1949.
2. The uniform code is a striving for an unworkable, ideal system, colored, I feel certain, by civilian concepts of the ideal justice, deviating from the workable Manual for Courts Martial, yet trying to resemble it.
3. I recommend—

(*a*) A thorough study of the proposed code by the American Bar Association in the same manner as the Manual for Courts Martial was studied.
(*b*) A fair try-out of Manual for Courts Martial, 1949.
(*c*) Nor rushing into a new, unstudied manual and code.

Although a uniform code might be advisable, the discarding of the system set up by the Elston Act, which was exhaustively considered and which remedied the defects of the old system, without a reasonable try-out, seems to me, hard to justify.

The effort to establish a judge and jury segregation is not desirable because of the exigencies of military trials. The present system should be tried for a while before such another radical departure is inaugurated.

As indicated in answer to number 2, I am not satisfied that Public Law 759, 1948, was a wise revision. It appears to have failed to distinguish between military justice as a command function, and the mere mechanics of trial procedure, and in seeking to improve the latter, has weakened the power of the officer having general court martial jurisdiction in exercising his function of maintenance and discipline. Public Law 759 was too strongly influenced by civilians or at least by those who, if members of the military, had little or no field experience. Until it has functioned sufficiently to indicate whether or not the changes it has effected are good or bad for the service, I believe further revision, particularly along the lines indicated of increasing civilian participation and influence with the concurrent weakening of command functions of the military, is premature, dangerous, and should not now be considered.

Furthermore, both S. 857 and H. R. 2498 appear principally concerned with removing disciplinary power from the hands of those charged with the responsibility of maintaining discipline, and only secondarily with uniformity between the services.

### OPPOSED TO UNIFORM CODE

I am unalterably opposed to a unified code. There are enough material differences in the physical structure of the several services, particularly the Navy, as distinguished from the Army and Air Force, to cause any attempted "Mother Hubbard" sort of a coverall code to be unwieldly and unworkable. Such matters as are common to the different services can be cared for by uniform or near uniform provisions in the Articles of War and the Articles of Government.

### CODE SHOULD BE DESIGNED FOR WAR

Any code should be drawn with the mind focused directly and only on conditions to be met in time of war, in foreign countries, with all three forces involved and command in a member of any one of them (even in relatively small commands as a small task force). So drawn, it may then be amended by additions to provide for conditions to be met in time of peace at home or in foreign countries and at home at any time.

### NEW SYSTEM WOULD WORK IN PEACE, NOT IN WAR

The proposed code would be complicated and difficult to administer in wartime. The civilian commission and the limitation of the power of the Judge Advocate General would weaken the administration of justice, remove responsibility, create delay, and might seriously impair the war effort. While the administration of military justice during the war was, in general, very fair to the accused and much more just than the civil criminal courts, the changes made by the Elston Act should further protect all accused against the miscarriage of justice.

This seems to be an attempt to set up a new branch of the Federal judiciary. It would work all right in times of peace and in the zone of the interior, but it is impractical during wartime operations overseas. I was with the Third Army in France and know how necessary it is to the maintenance of discipline to have prompt trials and speedy execution. We cannot afford the luxury of civil criminal trials in the armed forces during war any more than we can permit the practice of democracy by allowing soldiers to elect officers. In my opinion, the theater commander should have complete authority (subject to the approval of his judge advocate) over military justice in his area. No one thinks anything of it when a fine soldier is sent to his death in battle for the good of his command, but let some noisy, no good eight-ball get a general court martial and then Congressmen and the papers howl.

I do not know who originated or proposed the idea of a Judicial Council, but it impresses me as a very inane proposal. From long experience, including 8 years as a district attorney, I do not think a Judicial Council is in anywise necessary to protect individual rights. Such a council would be more duplication and added expense to a debt-ridden government. Even a casual study should show any interested persons there now exists adequate provisions for the protection of individual rights in the service.

I do think that in times of peace, or when not engaged in actual hostilities, that it might be advantageous to have a competent civilian lawyer to sit as a

member of the board of review; i. e., have one civilian and two servicemen upon each board of review. There is precedent for this in the Conseil de Guerre of the Belgian Army.

This proposed code would be most impractical in wartime. Civilians do not realize the problems of command. There is neither equality nor justice when a good soldier can be committed to action and at the same time extend every courtesy and safeguard to a felon. The articles were bad enough; the Elston Act no better. They should be streamlined rather than encumbered—at least for use in the field in time of war.

The proposed system of review I believe to be too complicated, particularly in wartime. With a trained legal staff, the judge advocate departments or corps of each of the services should be fully competent to handle all the military justice matters, and it must not be overlooked that in times of war a very large percentage of them will be Reserve officers—i. e., civilians on temporary military duty—and will in consequence bring into the service, to a large extent, civilian viewpoints.

WOULD WORK IN WAR, NOT IN PEACE

In my opinion, the mistakes in military justice during the war were primarily due to lack of training and not to faults of the system. In peacetime officers are sufficiently trained to properly perform the duties of trial judge advocate and defense counsel of courts martial. The proposed plan might work in wartime when many lawyers are available. In peacetime it would be very costly and, in my opinion, a waste of money which might be better spent in the interests of national defense.

LAW MEMBER SHOULD VOTE

Depriving the law officer of a vote seems to be a feeble attempt to create a "judge and jury" procedure. But the "jury" may be as few as four persons who not only find facts but impose sentence. The law officer's value in the "closed" session is much too great to be eliminated. Too many members of a court lack the necessary experience to be unguided finders of fact, particularly when the accused has just about no choice in their selection. It seems to me that the possibility of a "star chamber" becomes far too great.

The law officer definitely should be a member of the court and it is of the utmost importance that he participate in the discussions and deliberations of the court on all questions of findings and sentence. He should be there to properly guide the court to see that the findings are legally sufficient and especially in questions of finding an accused guilty of a lesser included offense. In his absence a legally insufficient sentence might be announced by the court or an improper lesser included offense. That can only be then corrected by a review, necessitating a new trial or rehearing, a waste of time and a miscarriage of justice. Once the error or damage has been done, the law officer is powerless to correct it. If permitted to discuss the matter in the court deliberations, he could prevent such mistakes.

To place the law member in the position of a judge instructing a jury in the limited manner prescribed, would place the balance of the court in the position of more jurors and deprive them of an experienced counselor during deliberations which is one of the valuable adjuncts of the present system.

The law member should deliberate and vote with the rest of the court to insure legal findings and sentence and to save time.

I believe the limitation of powers and duties of the law members very dangerous.

I believe justice to the accused will be more nearly obtained by giving the law officer or member the same authority he now has. My experience has been that the law member is the "balance wheel" of the court.

The law officer should have all the rights and privileges of all other members of the court. This will prevent other members from losing sight of issues in a case.

To have a law officer sit without a vote is like letting a jury decide questions of law as well as fact, leaving the judge a mere arbiter of order and decorum.

Such a provision would, for example, deprive a law member of the right to vote on a motion for acquittal, on the ground of insufficiency of the evidence. This is to leave what is purely a matter of law in the hands of persons who have no legal background or training. Apparently the idea behind this provision is the fear that the legal officer would tend to sway the court to too great an extent.

In the first place, he could easily do this without a vote. In the second place, voting is by secret written ballot, so that the vote of the law member or legal officer cannot sway other members of the court. It makes the post of too little importance in the eyes of the very court to whom he is legal adviser.

Errors committed by a court will more often than not be found because the court failed to heed the advice of the law member, or because the law member was not present at the trial. To require him to be present, to require him to advise and instruct the rest of the court, and to prevent him from voting is anomalous.

I agree with article 26 (b) only on the condition that the law member is empowered to direct a finding of "not guilty" for lack of evidence or to submit the case to the court on a lesser included offense. Also and most important, I would authorize the law member to comment on the evidence on record, so that the board of review will have a basis upon which to weigh the evidence appearing in the "cold" record of trial. This writer has tried hundreds of cases as the trial judge advocate of the general court and has had occasion to discuss most of those cases with the law members of the court after finding and sentence. As I now recall those cases, it is startling how many of those cases would have resulted in a finding of not guilty were it not for the presence of the law member; the reason being that so many of the court missed the point of the case completely and proceeded to make their decisions upon immaterial collateral issues. For example, in a recent robbery case the accused stated that he struck the complaining witness because of alleged indecent advances by such complaining witness. The coaccused denied such advances were made by the complaining witness, yet during the deliberation, some members of the court were willing to justify the assault on that basis and thereby completely lost sight of the fact that there was a robbery charge to be decided.

In the past 6 years I have been the law member of a number of general courts. Within the last 2 years I have observed a decided tendency on the part of members of courts when in closed session to go off on a tangent insofar as the actual elements of the offense charged were concerned in applying the evidence that was introduced. If the law member is removed from the closed session deliberations, we are going to have a number of "lesser included findings" that cannot be sustained and some findings of "not guilty" when the evidence would sustain and warrant a finding of guilty. It is not necessary he have a vote, but he darned sure better be in these closed sessions.

I feel strongly that the law officer should vote on the findings and sentence as his experience and specialized training are of great value to the lay members of the court.

### FAVORS DISTRICT COURT REVIEW

In lieu of the Judicial Council, it should be provided that the records of trial of all general courts martial involving sentences of a year or more; a dishonorable or bad-conduct discharge; death, and/or confinement in other than a military or naval stockade or disciplinary barracks, shall be reviewed by a United States district court before such sentence shall be finally executed. Such relief has always been available to the rich or influential members of the armed forces through the medium of a habeas corpus proceeding. In a democracy such as ours I feel that it should be equally available to the humble soldier and officer as well. A new article should be added setting up a civilian clerk of courts-martial records of trial, making those records of trial public records and available to the same extent as are the records of trial in any criminal proceeding of a United States district court. It is the element of secrecy which to a large extent account for the disgraceful results of our system of military justice in two World Wars.

In no instance, for even as long as an hour, should any member of the armed forces be confined in a Federal or State penitentiary or reformatory, except upon conviction of a felony, and even then not until the record of trial has been finally reviewed and found legally sufficient by a United States district court. The stigma of such confinement cannot be erased by any subsequent action and is obviously far different from that suffered by confinement in a military or

naval stockade or disciplinary barracks, which does not imply commission of a felony.

It seems to me that the military authorities headed by a Judge Advocate General or some responsible officer or board should have authority to handle each case to a conclusion with a tribunal consisting of constitutionally appointed United States judges having the power of appellate review. I do not believe that the Executive or any executive or administrative officer of body should have the final word in any controversy between a citizen and the State regardless of whether the offense was alleged to have been committeed by the citizens as a civilian or as a soldier.

SHOULD HAVE SENATE APPROVAL FOR JUDICIAL COUNCIL

Present set-up of a Judicial Council is vicious. It should be removed from politics. Members are removable at will of President. The chairman of Judicial Council should be appointed for life, as are judges of Federal courts, and should be required to have had at least 2 years military service and 2 years of judicial experience on some court of record, State or Federal. The other two members should be appointed for definite terms, say at least 6 years, one of whom should have had some judicial experience. Should have Senate approval as with Federal judges.

The members of the Judicial Council should be appointed in the same manner as our other Federal judges, and they should hold office during good behavior.

DON'T CHANGE NAME OF TRIAL JUDGE ADVOCATE

It is my personal opinion that the office of trial judge advocate should be retained as to name for the reason that that office carries with it certain duties and functions which are well known and well understood. Many of these duties and functions do not appear in writing in any particular code.

RESERVE PERSONNEL SHOULD NOT BE TRIED

I am absolutely against Reserve personnel being tried as now contemplated, particularly while on inactive duty. And what is most evil is the right to a continuing jurisdiction over personnel, although their active service is terminated. I view this with alarm.

GOOD SUMMARY AND SPECIAL COURTS ARE THE HEART OF THE PROBLEM

So far as I am concerned, none of the proposals reach what I consider to be the real problem. I consider the summary and special courts and A. W. 104 to be the real problem children. The abuses which I observed while in the Army, both as an enlisted man and an officer, were at that point. A. W. 104 was so flagrantly abused by one commanding officer that I marvel he kept his health. Anyone resents a forfeiture or confinement if it is unjustly imposed. It does little good for a reviewing officer on specials or summaries to order the record expunged because the enlisted man has already been punished and he is bitter about the experience. Trial judge advocates should be retained, removed from the pressure of command, and made responsible for the inferior courts in an attempt to make these courts work properly.

COERCION BY COMMANDING OFFICERS

The old M. C. M. was not bad; in fact, it was good if properly administered. The trouble during the war was too much interference and dictation, and often coercion from above. With proper administration, I believe the new M. C. M. is satisfactory.

In my experience, most of the evils complained of during World War II were attributable to the whims, foibles, caprices, and prejudices of certain commanders exercising general courts-martial jurisdiction sometimes aggravated by the "rat-race" policies for a time encouraged by the War Department. These evils, the Elston Act, formulated after exhaustive investigation and study by experts, was designed to correct. It should not be substantially changed without a fair tryout.

The thing in which I am vitally interested is the elimination, insofar as possible, of the possibility of a commanding officer bringing any pressure whatsoever upon

those engaged in the administration of military justice. I am in favor of enacting whatever laws may be necessary to insure a fair and impartial trial without pressure from any source.

STAFF JUDGE ADVOCATE'S OPINION ON LAW SHOULD BE BINDING ON COMMANDING OFFICERS

I feel the staff judge advocate's opinion on questions of law should be binding on the convening or confirming authority. I have seen clear cases completely disregarded by commanding officers and one man hanged when he was clearly guilty of nothing more than manslaughter.

A. W. 58 GREAT IMPROVEMENT

After considerable military justice experience: Six years assignment in the Army's correctional system, and 1 year's experience in teaching military law, I am convinced that the incorrigible military prisoner is a barbed thorn in the side of the Military Establishment.

The antiquated, prohibited provisions of A. W. 42, which make it impossible to transfer a general prisoner, for whom a disciplinary barracks has been designated as the place of confinement, to a United States penitentiary under the sentence, has always been a source of untold trouble in the Army's correctional system. The Navy has no such prohibition in its articles for government of the Navy, and readily transfers its bad actors to a United States penitentiary. As a result the Navy does not have the resultant unfavorable publicity, custodial headaches, and blighted military careers that have saddled the Army for all of these years.

In view of these facts, I am constrained to say that even with its defects, the proposed A. W. 58 is a great improvement over our present A. W. 42, as far as the Department of the Army is concerned.

I entertain the point of view that military justice should be separated from command even more than in the proposed bill. In general, the type of mind suited for command, is not the type which can supervise or administer impartial justice. As far as possible, this should be in the hands of competent civilians.

I disagree with the premise of military men that command must also exercise military justice in order to compel men to fight and to sustain morale by making examples of violators. The services should put forth as much effort on weeding out the cowards and misfits before they reach combat as it does in trying to compel them to fight after they get there. I am, therefore, strongly in favor of article 58 which makes it possible to commit a soldier to a correctional institution for discipline and treatment even for a minor offense. Many, particularly among the young, may be improved and returned to service.

RIGHT PERSONNEL IS THE SOLUTION

The people who are tinkering with the disciplinary system don't seem to understand fundamentals. The court-martial system as of the end of World War II was on paper near to perfection. It was a good disciplinary system, not a code of jurisprudence. If it had been administered by trained soldiers, lawyers, it would have produced discipline with justice. This was rarely tried. It should be tried now. Personnel is the problem.

Senator KEFAUVER. Col. W. A. Roberts?

(No response.)

Senator KEFAUVER. Is there anyone else here who wishes to file a statement or make an appearance at this time, either personally or on behalf of any organization?

(No response.)

Senator KEFAUVER. If not, the committee will stand in recess and will recess until 2:15 this afternoon, at which time we will hear the three judge advocates of the three services

(Whereupon at 12 noon, the committee adjourned to reconvene at 2:15 o'clock this afternoon.)

AFTERNOON SESSION

Senator KEFAUVER. The meeting will come to order. Statement of Colonel Roberts will appear in the record at this point.

(The statement referred to is as follows:)

MAY 19, 1949.

In re AMVETS' position on S. 857, Uniform Code of Military Justice.

CHAIRMAN, SENATE COMMITTEE ON ARMED SERVICES,
*United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: The initial impetus toward a thorough revision of our Code of Military Justice and the establishment of a uniform code for all defense agencies was taken by AMVETS while World War II was still in progress. Certain improvements have become law.

We participated in the hearings before the House of Representatives subcommittee on H. R. 2498 and took the position that the House bill with the proposed amendments was such an important improvement that we were unwarranted in delaying its passage. We have recently received the committee report on H. R. 4080 and have had some opportunity to check the minor amendments recommended by the House Committee on Armed Services. The amendments appear to be desirable and in fact in most instances are purely formal. It is the position of AMVETS that the Senate companion bill with essentially the same corrective amendments as recommended by the House committee should pass immediately so that adequate allocation of personnel and funds may be made from appropriations which become available on July 1, 1949, to place all sections of the bill in force. We do not mean by this that the proposed system of military justice is ideal and it will continue to be the policy of AMVETS to develop a separation of the prosecution and judicial functions in the application of military justice and the preservation of an independent channel of appeal in all echelons.

It is our opinion, however, that the bill involves fundamental reforms essential to the unification of the services and that it should be adopted. We assume and hope that mere passage and approval of the bill will not end the efforts of the committees of Congress in supervision of its administration and selection of the proper independent and capable personnel provided for by the act which is at least as important as the law itself. Persistent and sympathetic training of the minor personnel to perform the services of investigation, prosecution, and defense is also essential.

It is the purpose of AMVETS to continue its interest in the administration and enforcement of the act and to offer its full cooperation to the armed forces to the end that the full and great benefits which it will make available may be secured.

Respectfully yours,

WILLIAM A. ROBERTS,
(For AMVETS)

Senator KEFAUVER. Opinion of the Supreme Court in the case of *Wade* v. *Hunter* delivered on April 25, 1949, will be made a part of the record; also *Humphrey* v. *Smith*, April 25, 1949. We will also insert for the record a statement by Prof. Arthur John Keefe of the Cornell Law School.

(The material referred to is as follows:)

SUPREME COURT OF THE UNITED STATES

(No. 427.—October Term, 1948)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

*Frederick W. Wade, Petitioner*, v. *Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas*

[April 25, 1949]

MR. JUSTICE BLACK delivered the opinion of the Court.

The Fifth Amendment to the Constitution provides that a person shall not "be twice put in jeopardy of life or limb" for the same offense. The petitioner, now in prison under a court-martial conviction for a serious offense, contends he is

entitled to his freedom because another court-martial had previously put him in jeopardy for the same offense. The first court-martial was dissolved by the convening authority before the court reached a decision. The Government contends that the Fifth Amendment's double-jeopardy provision, if applicable to military courts, did not bar the second court-martial conviction here because, as the Government views the record, dissolution of the first court-martial was dictated by a pressing military tactical situation. The circumstances from which these contentions arise are as follows.

March 13, 1945, American troops of the 76th Infantry Division entered Krov, Germany. The next afternoon two German women were raped by two men in American uniforms. Several days later petitioner and another American soldier were arrested upon charges that they committed these offenses. Two weeks later, March 27, the troops had advanced about 22 miles further into Germany to a place called Pfalzfeld. On that date at Pfalzfeld petitioner and the other soldier were put on trial before a general court-martial convened by order of the Commanding General of the 76th Infantry Division to which Division the two soldiers were attached.[1] After hearing evidence and arguments of counsel, the court-martial closed to consider the case. Later that day the court-martial reopened and announced that the court would be continued until a later date to be fixed by the judge advocate. The reason for the continuance was the desire of the court-martial to hear other witnesses not then available before deciding the guilt or innocence of the accused.[2]

A week later the Commanding General of the 76th Division withdrew the charges from the court-martial directing it to take no further proceedings. The General then transmitted the charges to the Commanding General of the Third Army with recommendations for trial by a new court-martial. The reason for transferring the charges as explained in a communication to the Commanding General of the Third Army was:

"The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness, and the Court continued the case so that their testimony could be obtained. Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time."

The Commanding General of the Third Army concluded that the "tactical situation" of his command and its "considerable distance" from Krov made it impracticable for the Third Army to conduct the court-martial. Accordingly, he in turn transmitted the charges to the Fifteenth Army, stating that this action was necessary to carry out the policy of the American Army in Europe to accelerate prompt trials "in the immediate vicinity of the alleged offenses." Pursuant to this transmittal, the Fifteenth Army Commanding General convened a court-martial at a point about forty miles from Krov. Petitioner, represented by counsel, filed a plea in bar alleging that he had been put in jeopardy by the first court-martial proceedings and could not be tried again. His plea was overruled, the case was tried, and a conviction followed. He was sentenced to a dishonorable discharge, forefeiture of all pay and allowances, and life imprisonment, which imprisonment was later reduced to twenty years.[3]

After exhausting his right to military review, petitioner brought this habeas corpus proceeding in a federal district court. That court ordered his release, holding that his plea of former jeopardy should have been sustained. 72 F. Supp. 755. The Court of Appeals reversed, one judge dissenting. 169 F. 2d 973. We hold that under the circumstances shown, the Fifth Amendment's double-jeopardy provision did not bar petitioner's trial before the second court-martial.[4]

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[1] The charges were under the 92d Article of War, 10 U. S. C. § 1564.

[2] "LAW MEMBER: The Court desires that further witnesses be called into the case, and to allow time to secure these witnesses, this case will be continued. We would like to have as witnesses brought before the Court, the parents of this person making this accusation, Rosa Glowsky, and also the sister-in-law that was in the room who could further assist in the identification or identity of the accused. The Court will be continued until a later date set by the T.[rial] J.[udge] A.[dvocate]."

[3] The other soldier was acquitted by the court-trial. The acting Army judge advocate in reviewing petitioner's conviction said: "Four witnesses, all Germans, positively identified the accused Wade. The same witnesses failed to identify" the other soldier.

[4] Our holding that under the circumstances here the Fifth Amendment did not bar trial by the second court-martial makes it unnecessary to consider the following questions discussed in the Government's brief: (1) To what extent a court-martial's overruling of a plea of former jeopardy is subject to collateral attack in habeas corpus proceedings. See *Carter* v. *McClaughry*, 183 U. S. 365, 390; and cf. *Grafton* v. *United States*, 206 U. S. 333,

The interpretation and application of the Fifth Amendment's double-jeopardy provisions have been considered chiefly in civil rather than military court proceedings. Past cases have decided that a defendant, put to trial before a jury, may be subjected to the kind of "jeopardy" that bars a second trial for the same offense even though his trial is discontinued without a verdict. See *Kepner* v. *United States*, 195 U. S. 100, 128; *cf. Palko* v. *Connecticut*, 302 U. S. 319, 322–323. The same may be true where a judge trying a case without a jury fails for some reason to enter a judgment. *McCarthy* v. *Zerbst*, 85 F. 2d 640, 642. The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. And there have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of a jury might be biased against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial.[5] What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

When justice requires that a particular trial be discontinued is a question that should be decided by persons conversant with factors relevant to the determination. The guiding rule of federal courts for determining when trials should be discontinued was outlined by this Court in *United States* v. *Perez*, 9 Wheat. 579. In that case the trial judge without consent of the defendant or the Government discharged the jury because its members were unable to agree. The defendant claimed that he could not be tried again and prayed for his discharge as a matter of right. In answering the claim this Court said at p. 580:

". . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office . . ."

The rule announced in the *Perez* case has been the basis for all later decisions of this Court on double jeopardy.[6] It attempts to lay down no rigid formula. Under the rule a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice. We see no reason why the same broad test should not be applied in deciding whether court-martial action runs counter to the Fifth Amendment's provision against double jeopardy. Measured by the *Perez* rule to which we adhere, petitioner's second court-martial trial was not the kind of double jeopardy within the intent of the Fifth Amendment.

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352–353; *Sunal* v. *Large*, 332 U. S. 174, and cases collected in n. 8, p. 179. (2) The validity of the Fortieth Article of War, 41 Stat. 795, 10 U. S. C. § 1511. That article provides in part as follows:

"No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case."

[5] *Simmons* v. *United States*, 142 U. S. 148, 154; *Thompson* v. *United States*, 155 U. S. 271, 273–274.

[6] See, *e. g.*, *Simmons* v. *United States*, 142 U. S. 148; *Logan* v. *United States*, 144 U. S. 263, 297–298; *Keerl* v. *Montana*, 213 U. S. 135, 137; *Lovato* v. *New Mexico*, 242 U. S. 199.

There is no claim here that the court-martial went beyond its powers in temporarily continuing the trial to obtain the benefit of other witnesses.[7] But the District Court viewed the record as showing that the only purpose of dissolving the court-martial was to get more witnesses. This purpose, the District Court held, was not the kind of "imperious" or "urgent necessity" that came within the recognized exception to the double-jeopardy provision. See *Cornero* v. *United States*, 48 F. 2d 69. We are urged to apply the *Cornero* interpretation of the "urgent necessity" rule here. We are asked to adopt the *Cornero* rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take "all circumstances into account" and thereby forbid the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest.

Furthermore, this record is sufficient to show that the tactical situation brought about by a rapidly advancing army was responsible for withdrawal of the charges from the first court-martial. This appears in the first order of transmittal of the charges. That order was made by the Commanding General of the 76th Division who was responsible for convening the court-martial and who was also responsible for the most effective military employment of that Division in carrying out the plan for the invasion of Germany. There is no intimation in the record that the tactical situation did not require the transfer order. The court-martial was composed of officers of the invading Army Division. Momentous issues hung on the invasion and we cannot assume that these court-martial officers were not needed to perform their military functions. In the *Perez* case we said that the sound discretion of a presiding judge should be accepted as to the necessity of discontinuing a trial. This case presents extraordinary reasons why the judgment of the Commanding General should be accepted by the courts. At least in the absence of charges of bad faith on the part of the Commanding General, courts should not attempt to review his on-the-spot decision that the tactical situation required transfer of the charges.

*Affirmed.*

Mr. JUSTICE MURPHY, with whom Mr. JUSTICE DOUGLAS and Mr. JUSTICE RUTLEDGE agree, dissenting.

I agree with the court below that in the military courts, as in the civil, jeopardy within the meaning of the Fifth Amendment attaches when the court begins the hearing of evidence. I agree also that a valid charge was pending before the first court-martial with which we are now concerned, and that the court had jurisdiction of the subject-matter and of the person of the petitioner.

In the first court-martial evidence was introduced; in fact, both sides had completed the presentation of their cases and had submitted oral argument, and the court had closed to consider its decision. The court was later opened on its own motion, for the purpose of hearing the testimony of three named witnesses, who were expected to shed light on the question of identification.

The Commanding General of the unit comprising petitioner and the court-martial that was trying him withdrew the charges and dissolved the court-martial, and transmitted the papers to the Commanding General of the Third Army, "with a recommendation of trial by general court-martial." They were subsequently transferred to the Commanding General of the Fifteenth Army, who referred the case for trial by general court-martial. Petitioner was tried and convicted, after the court-martial had overruled a plea of former jeopardy based on the prior proceeding. The Commanding General, Fifteenth Army, on the recommendation of his Staff Judge Advocate, approved the finding of guilty and reduced the period of confinement from life to twenty years. The case was assigned for review to Board of Review No. 4, consisting of three Judge Advocates in the Branch Office of the Judge Advocate General with the European Theater. This Board, sitting in Paris, close to the scene of military

[7] The Manual for Courts-Martial, par. 75a (1928), recommends that where the ". . . evidence appears to be insufficient for a proper determination of any issue or matter before it, the court may and ordinarily should, take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination. The court may, for instance, require the trial judge advocate to recall a witness, to summon new witnesses, or to make investigation or inquiry along certain lines with a view to discovering and producing additional evidence."

operations, filed a unanimous opinion to the effect that the plea in bar should have been sustained [9] and that consequently the record of trial was legally insufficient to support the findings and sentence. The Assistant Judge Advocate General filed a dissenting opinion, and the sentence was confirmed by the Commanding General, European Theater. In the *habeas corpus* proceedings in the United States, the District Court agreed with the Board of Review that the plea of double jeopardy should have been sustained. The Court of Appeals reversed, one judge dissenting.

There is no doubt that Wade was placed in jeopardy by his first trial. This Court now holds that the decision of his Commanding Officer, assessing the tactical military situation, is sufficient to deprive him of his right under the Constitution to be free from being twice subjected to trial for the same offense. With this reading of the Constitution I cannot agree. The harassment to the defendant from being repeatedly tried is not less because the army is advancing. The guarantee of the Constitution against double jeopardy is not to be eroded away by a tide of plausible-appearing exceptions. The command of the Fifth Amendment does not allow temporizing with the basic rights it declares. Adaptations of military justice to the exigencies of tactical situations is the prerogative of the commander in the field, but the price of such expediency is compliance with the Constitution. I would reverse the judgment below.

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SUPREME COURT OF THE UNITED STATES

(No. 457.—October Term, 1948)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

*George W. Humphrey, Warden, United States Penitentiary, Lewisburg, Pennsylvania*, v. *Bernard W. Smith*

[April 25, 1949]

Mr. JUSTICE BLACK delivered the opinion of the Court.

The respondent, Bernard W. Smith, an American soldier, was convicted by an Army court-martial for rape of one woman and assault with intent to rape another in violation of the 92d and 93d Articles of War. 10 U. S. C. §§ 1564 and 1565. His punishment was dishonorable discharge, forfeiture of all pay and allowances, and imprisonment for life. Army reviewing authorities approved the conviction and sentence, but the President reduced the punishment to sixteen years' imprisonment. This habeas corpus proceeding was brought in a District Court challenging the validity of the conviction. The District Court denied relief. 72 F. Supp. 935. The Court of Appeals reversed, ordering respondent's discharge. 170 F. 2d 61. We granted certiorari because the petition raises questions concerning important phases of court-martial statutory powers and the scope of judicial review of court-martial convictions.

We may at once dispose of the contention that the respondent should not have been convicted on the evidence offered. That evidence was in sharp dispute. But our authority in habeas corpus proceedings to review court-martial judgments does not permit us to pass on the guilt or innocence of persons convicted by courts-martial.[1]

It is contended that the court-martial was without jurisdiction to try respondent. If so the court-martial exceeded its lawful authority and can be invalidated despite the limited powers of a court in habeas corpus proceedings.[2]

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[9] The opinion of the Board of Review reads in part as follows: "We see nothing which renders the absence of witnesses, as shown by the record of trial in this case, an emergent situation in exception to the rule in the Federal courts. Their witnesses may lie beyond the reach of process, if process issues witnesses may not respond, oral promises to appear may not be kept, and they may become ill during trial; but such difficulties in proof are not grounds for a termination of trial and a second prosecution. Imperious necessity means a sudden and overwhelming emergency, uncontrollable and unforeseeable, infecting the judicial process and rendering a fair and impartial trial impossible. It does not mean expediency." Transcript of Record, p. 75.

[1] *Carter* v. *McClaughry*, 183 U. S. 365, 381; and see *In re Yamashita*, 327 U. S. 1, 8–9, and cases cited.

[2] *United States* v. *Cooke*, 336 U. S. 210; *Collins* v. *McDonald*, 258 U. S. 416, 418; see *In re Yamashita*, 327 U. S. 1, 8–9.

The soundness of this contention depends upon an interpretation of the 70th Article of War, the pertinent part of which is set out below.[3] It provides the manner in which pre-trial investigations shall be made preliminary to trials of soldiers before general courts-martial. A part of the language is that "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation shall have been made." The contention is that this requirement is jurisdictional in nature; that the kind of pre-trial investigation prescribed is as indispensable prerequisite to exercise of general court-martial jurisdiction; and that absent such prior investigation a judgment of conviction is wholly void.

Here there was an investigation. The claim is that it was neither "thorough" nor "impartial" as the 70th Article requires. The Court of Appeals, one judge dissenting, so held, and its reversal was rested on that finding. There was no finding that there was unfairness in the court-martial trial itself.

We do not think that the pre-trial investigation procedure required by Article 70 can properly be construed as an indispensable prerequisite to exercise of Army general court-martial jurisdiction. The Article does serve important functions in the administration of court-martial procedures and does provide safeguards to an accused. Its language is clearly such that a defendant could object to trial in the absence of the required investigation. In that event the court-martial could itself postpone trial pending the investigation. And the military reviewing authorities could consider the same contention, reversing a court-martial conviction where failure to comply with Article 70 has substantially injured an accused.[4] But we are not persuaded that Congress intended to make otherwise valid court-martial judgments wholly void because pre-trial investigations fall short of the standards prescribed by Article 70. That Congress has not required analogous pre-trial procedure for Navy courts-martial is an indication that the investigatory plan was not intended to be exalted to the jurisdictional level.

Nothing in the legislative history of the Article supports the contention that Congress intended that a conviction after a fair trial should be nullified because of the manner in which an investigation was conducted prior to the filing of charges. Its original purposes were to insure adequate preparation of cases, to guard against hasty, ill-considered charges, to save innocent persons from the stigma of unfounded charges, and to prevent trivial cases from going before general courts-martial. War Department, *Military Justice During the War*, 63 (1919). All of these purposes relate solely to actions required in advance of formal charges or trial. All the purposes can be fully accomplished without subjecting court-martial convictions to judicial invalidation where pre-trial investigations have not been made.

Shortly after enactment of Article 70 in 1920 the Judge Advocate General of the Army did hold that where there had been no pre-trial investigation, court-martial proceedings were void *ab initio*.[5] But this holding has been expressly repudiated in later holdings of the Judge Advocate.[6] This later interpretation has been that the pretrial requirements of Article 70 are directory, not mandatory, and in no way affect the jurisdiction of a court-martial. The War Department's interpreta-

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[3] "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides." 41 Stat. 759, 802, as amended 50 Stat. 724; 10 U. S. C. § 1542. See also Pub. L. No. 759, 80th Cong., 2d Sess. §§ 222, 231, 244 (June 24, 1948).

[4] Military reviewing authorities do not revise court-martial convictions for failure to follow pre-trial procedure unless it appears to them that such failure has injuriously affected the substantial rights of the accused. CM 229477, *Floyd*, 17 B. R. 149, 153–156 (1943). The Assistant Judge Advocate General testifying before the Committee on Armed Services stated: "If it appeared in the Office of the Judge Advocate General that the man had been deprived of any substantial right, such as the presentation of testimony in his own behalf, or something of that kind, it would be possible for us to say that the error injuriously affected the rights of the accused and that the sentence should therefore be vacated. The case of real injury would be rare. Ordinarily guilt or innocence is and should be determined at the trial and not by what occurred prior to the trial." *Hearings before subcommittee No. 11, Legal, of House Committee on Armed Services on H. R. 2575*, 80th Cong., 1st Sess. 2059–2060 (1947).

[5] CM 161728, *Clark*. See also to the same effect CM 182225, *Keller;* CM 183183 *Claybaugh*.

[6] See *Floyd, supra*, n. 4; CMETO 4570, *Hawkins*, 13 B. R. (ETO) 57, 71–75 (1945); CM 323486, *Ruckman*, 72 B. R. 267, 272–274 (1947).

tion was pointedly called to the attention of Congress in 1947 after which Congress amended Article 70 but left unchanged the language here under consideration.[7]

We hold that a failure to conduct pre-trial investigations as required by Article 70 does not deprive a general court-martial of jurisdiction so as to empower courts in habeas corpus proceedings to invalidate court-martial judgments. It is contended that this interpretation of Article 70 renders it meaningless, practically making it a dead letter. This contention must rest on the premise that the Army will comply with the 70th Article of War only if courts in habeas corpus proceedings can invalidate any court-martial conviction which does not follow an Article 70 pre-trial procedure. We cannot assume that judicial coercion is essential to compel the Army to obey this Article of War. It was the Army itself that initiated the pre-trial investigation procedure and recommended congressional enactment of Article 70.[8] A reasonable assumption is that the Army will require compliance with the Article 70 investigatory procedure to the end that Army work shall not be unnecessarily impeded and that Army personnel shall not be wronged as the result of unfounded and frivolous court-martial charges and trials.[9]

This court-martial conviction resulting from a trial fairly conducted cannot be invalidated by a judicial finding that the pre-trial investigation was not carried on in the manner prescribed by the 70th Article of War.[10]

*Reversed.*

Mr. JUSTICE MURPHY, with whom Mr. JUSTICE DOUGLAS and Mr. JUSTICE RUTLEDGE concur, dissenting.

Pretrial investigation under the seventieth Article of War performs a dual function. It saves the Army's time by eliminating frivolous cases; it protects an accused from the ignominy of a general court martial when the charges against him are groundless. These policies, of course, mean more than the protection of the respondent in this case. Their primary service appears when the defendant is clearly innocent. If the Article is ignored, and the court martial finds the defendant innocent, the error can never be corrected—the officers' time has been wasted and the defendant's record is forever besmirched by the words "general court martial." Yet if the prisoner is found guilty, there is still no sanction. For military authorities will not set aside a conviction unless the very accused asking reversal has been prejudiced. And if the trial has been fair, and resulted in conviction, who will say that the defendant has been prjudiced because preliminary investigation was wanting?

Unless a civilian court is able to enforce the requirement, then, it is not a requirement at all, but only a suggestion which should be observed. Today the Court adopts the later alternative. It holds that the error of noncompliance with A. W. 70 is not jurisdictional. It makes A. W. 70 a virtual dead letter.

I cannot impute so bland a rule to the Congress. And no evidence of such sterility has been brought to our attention. What the Eightieth Congress thought about the problem is irrelevant, of course, for A. W. 70 was the product of the Sixty-Sixth Congress, in 1920, and respondent was tried in 1944, long before the Eightieth Congress convened. Had respondent's trial taken place in 1948, the result might be entirely different. The available evidence indicates clearly

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[7] Pub. L. No. 759, 80th Cong., 2d Sess., §§ 222, 231, 244 (June 24, 1948). In congressional committee hearings War Department representatives were subjected to considerable questioning as to whether pre-trial requirements should be made jurisdictional prerequisites. One of many statements supporting the War Department's view was that of Undersecretary of War Royall, who testified:

"However, our bill does not make it a jurisdictional factor, but it does contemplate a thorough investigation. In the states in which I have practiced law preliminary investigations are never a jurisdictional requirement. I know they are not in the Federal courts. . . . We would be departing radically from accepted judicial practice, generally throughout the United States, if we made that a jurisdictional requirement. That is really the difference between the Durham bill and this, as I understand."

This statement and others in opposition to raising pre-trial investigations to a jurisdictional level appear at the following pages of the *Hearings before subcommittee No. 11, Legal, of House Committee on Armed Services on H. R. 2575*, 80th Cong., 1st Sess. 1924–1925, 2058–2061, 2064–2065, 2146, 2152–2153 (1947).

[8] War Department, *Military Justice During the War*, 63 (1919); H. R. Rep. No. 940, 66th Cong., 2d Sess. 2 (1920).

[9] Secretary Royall, in referring to the procedure told the House Committee: "We believe very strongly in it and we will provide for it as strongly as we can, without making it grounds for a technical appeal." *Hearings before subcommittee No. 11, Legal, of House Committee on Armed Services on H. R. 2575*, 80th Cong., 1st Sess. 2152 (1947).

[10] District Courts and Courts of Appeal have not been in agreement on the question. *Henry* v. *Hodges*, 76 F. Supp. 968, 970–974; *Anthony* v. *Hunter*, 71 F. Supp. 823, 830–831; *Hicks* v. *Hiatt*, 64 F. Supp. 238, 242; *Waite* v. *Overlade*, 164 F. 2d 722, 723–724; *DeWar* v. *Hunter*, 170 F. 2d 993, 995–997.

that the Sixty-Sixth Congress considered preliminary investigation vital before trial. The language of the Article is that of command—"no charge *will be referred*" without investigation. The report accompanying the 1920 statute, after referring to an investigation of unfairness in administering military justice, and concluding that "the personal element entered too largely into these cases," listed twenty-three changes in the law. The second change mentioned was this: "Speedy, but thorough and impartial preliminary investigation will be had in all cases." H. R. Rep. No. 940, 66th Cong., 2d Sess. (1920), p. 2.

In 1924, just four years after A. W. 70 became the law, the Board of Review construed the language directly opposite to the Court's present interpretation. It held that the error was jurisdictional. Cm 161728, *Clark*. Two later holdings, both in 1928, confirmed this view. CM 182225, *Keller;* Cm 188183, *Claybaugh*. In *Keller*, the investigation took place, but was not "thorough." The Board held that a thorough investigation was "an absolute right given to the accused by statute." And in 1937 Congress reenacted the same language we are construing now, the same language the Board of Review expounded in 1924 and 1928. 50 Stat. 724. It seems extraordinary to say that reversals of the prior rulings in 1943, CM 229477, *Floyd*, 17 B. R. 149, should govern when Congress has apparently acquiesced in the first, and contemporary, interpretations.

Congressional belief in the importance of preliminary investigation should not now be frustrated by a holding that noncompliance cannot be attacked by *habeas corpus*. I agree with the court below that the preliminary investigation in this case did not meet the proper standard, and would affirm the judgment.

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STATEMENT OF PROF. ARTHUR JOHN KEEFFE, OF CORNELL LAW SCHOOL

For over 11 years I have been a teacher of law at Cornell Law School in Ithaca, N. Y. Prior to that time I was for about 12 years a practicing lawyer with the firm known now as Milbank, Tweed, Hope & Hadley, at 15 Broad Street, New York, N. Y. From April 9, 1946 to June 12, 1947, I was president of the General Court-Martial Sentence Review Board of the United States Navy. I took the job at Mr. Forrestal's request to give a civilian review to over 2,000 naval courts martial and to study the court-martial system and make recommendations for its reform. With Felix Larkin, Esq., the executive secretary of the Committee that drafted this uniform code, I was one of two civilian members of an otherwise all-uniform board.

I regret to state that I must oppose the enactment of this proposed uniform code in its present form. I do this the more reluctantly because of the personal admiration I have for both Prof. Edmund M. Morgan, Jr., and Felix Larkin, Esq. They are the ablest of lawyers and the finest of fellows. Mine is also a reluctant opposition because there is a beginning in this code of real reform. An effort has been made to achieve the same procedures in the three services and for the first time civilian judges are created to give a limited review. In contrast with the Chamberlain bill of 1920 for which Professor Morgan once fought so hard, this proposed uniform code, however, is a sorry substitute.

I oppose the code for two reasons:

*1. Lack of Civilian Advisory Council*

After an exhaustive study of the court-martial system, Army and Navy, American and British, and, to the extent available, other foreign countries, our board recommended to Mr. Forrestal that an advisory council be appointed to draft reform proposals for Congress.

This recommendation was in the highest tradition of the legal profession. Roscoe Pound of the Harvard Law School many years ago suggested it to the American Bar Association. That association under the magnificent leadership of William D. Mitchell and with the aid of Chief Justice Hughes and Attorney General Cummings obtained rule-making powers from the Congress for our Federal courts. Mr. Mitchell is at present Chairman of the Advisory Committee to the Supreme Court with respect to the Federal Rules of Civil Procedure. There was a similar Advisory Committee on the Federal Criminal Rules under the Chairmanship of Chief Justice Floyd E. Thompson. In the State of New York, as the result of a celebrated law-review article of Mr. Justice Benjamin Cardozo, two similar advisory bodies were long ago established, the judicial council and the law revision commission.

The reason why law reform has gone to court rules rather than codes is because codes quickly become rigid, and out of date. The Congress has too

many other important things to do to make changes in legal procedure. A splendid beginning was made in the drafting of court martial, by Judge Matthew McGuire for the Navy.

In my personal judgment the worst thing wrong with this uniform code is its failure to provide the permanent, independent advisory council which our board suggested and which the American Bar Association suggests.

The uniform code does provide for three civilian judges and I am happy that it does, but the annual report of these men and the three Judge Advocates General (code, 67g) is a poor substitute for the informed disinterested criticism that men such as Arthur Vanderbilt and Matthew McGuire would give the armed services and the Congress.

A moment's reflection will convince you that this is so. Take any of a myriad of agencies that the Congress from time to time creates. Each begins zealously and alive to the public interest. All too quickly each agency comes to associate as the public the litigants that appear before it. In many cases we have seen the best agency go quickly to pot because there was not that disinterested civilian criticism that only a body constituted as the suggested advisory council could give. I think many agencies in Washington would welcome aid such as we suggest and I cannot understand why the armed services reject it.

Having made the mistake of not appointing an advisory council of disinterested civilians to draft this code, the mistake is compounded by sending this code to the Congress without clearing it with the American Bar Association and other representative lawyer and veteran groups.

There can be only one explanation as to why this has not been done. The armed services do not want any civilian control if they can avoid it.

Let me call to your attention what an advisory council can do.

(*a*) There ought to be one Judge Advocate's Department, not three.

Why have three Judge Advocates General? Why not merge completely at least the review functions of the three services and save the country money and become more efficient? It should be noted that Mr. Forrestal has suggested something of this sort for the medical service.

(*b*) There should be one top board of sentence review.

The code does not provide for a top board of sentence review or clemency board (See Keeffe report, pp. 230–236). Presumably such boards are to be set up administratively by regulations. (See Art. 36.) This means that with no genuine civilian advisory council, the services will do as they please about such boards. It is not even provided that the three civilian judges buried in the Department of Defense need be consulted, though doubtless they would be. This is most important because over 75 percent of all court-martial cases are desertion or a. w. o. l. and involve difficult psychiatric problems. A citizen army is bound to have many citizens who cannot make the necessary adjustment. Our board suggested that this important problem be tackled by a top clemency board headed by a distinguished civilian lawyer upon which, in addition to the clemency officers of the services, there would be an able civilian psychiatrist and penologist.

There is need to study the prison systems of the services and such a top board of sentence review would represent a needed check on the military prisons. Let's not forget what Thomas Mott Osborn found in the miiltary prisons after the First World War. It would be an invaluable aid to a civilian advisory council to have such a check on the prisons. Where is it?

(*c*) Are officers treated better than men?

A great deal has been said about officers receiving less severe treatment than enlisted men. Though our board reviewed almost every case of a man convicted by a naval court martial down to 1 month after VJ-day who was still in prison when we reached his case, we saw the cases of only three officers. We thus could not say whether officers did or did not receive more favorable treatment than men and we pointed out that the problem was difficult and ought to be studied after a review of the cases (Keeffe report, pp. 327–333). Nothing has been done about it. Will the three buried judges do this review with the three Judge Advocates General? You can be sure that if the Congress does not create the advisory council it will never be done.

(*d*) The effect of each discharge should be studied.

Clemency has been granted in many cases by both the Army and Navy by changing a dishonorable discharge to a bad-conduct discharge. This is so much double talk because so far as our board could discover, there is very little practical difference between a bad-conduct and a dishonorable discharge. We asked that the advisory council be created to study these discharges so that if a

man deserves some clemency and his discharge is to be changed from dishonorable to a better ticket, he will receive the mercy (Keeffe report, pp. 310–325). There has been no advisory council and, therefore, there is not likely to be any correction of this dreadful injustice. To a man of self-respect, one of these discharges is civil death because a recipient of either cannot be employed by the State or Federal Governments or many corporations.

(*e*) Should not double jeopardy be abolished?

From the cases our board reviewed we were worried about the prevalence of double jeopardy in the armed services. An enlisted man gets into trouble. He is arrested and tried and jailed in the civil courts or his case is heard and he is acquitted or his sentence is suspended. When he is released by the civil authorities he is promptly tried again by the military for the same offense. This is wrong. In our report we said so and asked that the advisory council study this in all its phases. (See Keeffe report, pp. 270–278.) As you might expect with no advisory council, nothing has been done and article 14 of this uniform code preserves double jeopardy in all its glory.

(*f*) The barbarous practice of not dating sentence from arrest continues in this code.

In case after case our board reviewed, no credit was given for time the enlisted man spent in jail before sentence. Article 57 (b) provides that sentence runs from the date of rendition and I cannot see that any credit is to be given for prior confinement.

In our report we asked that credit be given in whole or in part from the date of arrest depending upon whether the defendant was confined to quarters or the post or incarcerated in the brig (Keeffe report, pp. 182–186). The point is important, as in many cases delay of trial for proper preparation is in the defendant's interest and if subsequently convicted he ought to receive credit in the sentence rendered by the trial court. Once more an advisory council is needed.

(*g*) Could not an advisory council advise the armed services and the Congress as to whether the civil legal work of the services could best be handled by the judge advocates or civilian general counsel?

An advisory council would be of great value to the armed services because there is a great deal of civil litigation and procurement now handled by civilian lawyers in both the Navy and Army and Department of Defense. Ballantine made a study for the Navy on the Office of the General Counsel that such an advisory council could and should follow up.

I have taken the liberty of listing these matters at considerable length to show the committee that there is no advisory council created for the same reason that the drafting of this code was not done by such an advisory council. The armed services want a minimum of civilian control, preferably none. I don't blame them. But as former President Herbert Hoover has recently pointed out, the expenditure of money is so great a factor in our total economy there must be more not less civilian control. In this instance a citizen army is to be left without civilian disinterested advice. Above every other reform, the Congress must insist upon the appointment of a civilian advisory council by the President. If this be done it will not matter whether the proposed uniform code is enacted or defeated. The business will then be in competent disinterested civilian hands and by annual reports and studies the Congress and the Secretary of Defense can correct the serious defects in this present legislation.

2. *Unlike the Chamberlain bill of 1920, the present uniform code preserves substantially unimpaired command control of the court-martial system; and it fails to provide the needed impartial review*

The Congress will remember that the Chamberlain bill of 1920, which failed proposed that command control of courts martial be eliminated in two ways (1) the convening authority or commanding officer was not to have the right any longer to review the judgment of the court that heard the case; (2) court-martial cases after they were decided by the trial court were to be reviewed automatically before three judges appointed by the President, constituting a Court of Military Appeals and located in the Office of the Judge Advocate General. In sharp contrast to the provisions of the Chamberlain bill, the present uniform code preserves intact the review of the convening authority, not only for clemency but also for points of law. And while it does create a Judicial Council, consisting of three civilian judges and located in the Department of Defense, the right to appeal a court-martial case to this judicial council is badly limited.

Let me take up these matters in more detail:

(*a*) The code leaves unlimited review in the convening authority that makes the charges and appoints the court.

The convening authority or commanding officer makes the charges against the accused and picks the membership of the court. From the experience of our board in reviewing naval courts martial, I can confidently assert that the principal thing wrong with trials is the fact that the court is so under the domination of the commanding officer that there is no trial at all. It is not so much that innocent men are convicted as that outrageously long sentences are given by the trial court. The convening authority is not a member of the trial court. He does not see the accused or hear the witnesses. Yet the trial court knows that their decision will be reviewed by the convening authority and the line of least resistance for the members of the court is to fix a long sentence and let the convening authority fix the final sentence. This is just the reverse of what should be done. The court under our American system—the court that hears the accused and sees the witnesses—should follow through and fix the sentence, because it is in the best position to do so.

It was the suggestion of Arthur Vanderbilt that this review of the convening authority on law points be eliminated and that the review power be cut down to review for clemency only. It has been the suggestion of the American Bar Association not only that the review be limited to clemency but that the selection of the court be made by the Judge Advocate General and taken away from the convening authority. This suggestion is a good one and I heartily approve it. It was the suggestion of our board that the provisions of the Chamberlain bill of 1920 be followed, and that the review power of the convening authority for either law points or clemency be eliminated entirely (Keeffe report, pp. 189 to 206). This is for the reason that we thought that under the guise of clemency a convening authority will actually fix the sentence and the courts appointed by him would continue to give too long sentences, knowing full well that under his clemency power, the convening authority will reduce the sentence to what he thinks it ought to be. The viciousness of this system has always been the fact that not all sentences were reduced as the trial court thought they would be.

The difficulty is that the present uniform code preserves intact (art. 60–64) the right of the convening authority or the commanding officer to make the charges against the accused, to appoint the court that is to try the accused, and to review the sentence passed by his own appointed court.

There will never be any improvement in court-martial trial procedure so long as this power remains in the convening authority or commanding officer.

(*b*) The code preserves an unnecessary and expensive bureaucracy in that boards of review in the offices of the Judge Advocates General are unnecessary, wasteful, cumbersome, and undesirable.

The present uniform code not only provides for review by the convening authority or commanding officer but after the case has passed him, it is to be reviewed by boards of review in the offices of the three Judge Advocates General. This seems to me an unnecessary step and a waste of time and money. An efficient review would bring the case directly from the trial court to a court of military appeals such as the Chamberlain bill proposed. The boards of review in the offices of the three Judge Advocates General appointed by him will be subject to his control. You cannot expect such boards of review to give that disinterested impartial review that the Congress desires. Like the trial court, under the domination of the convening authority, the boards of review will be under the domination of the Judge Advocate General. It is equally undesirable. Courts should not be under the domination of anyone. The very creation of these boards of review is most undesirable in that it is proposed to give some cases only a military review before these boards of review. This perpetuates the old mistake of unequal review.

(*c*) Appeals under the code to the judicial court appear to be for generals and admirals Unless you get death.

The present uniform code creates a Judical Council of three civilian judges, but the difficulty is that the same vice that was present before persists. The great virtue of the Chamberlain bill was that the case of every man was reviewed automatically before a court of judges appointed by the President. This was our suggestion (Keeffe report, pp. 216–222). There is no reason why the three judges cannot be expanded to five or seven if need be, and all the cases heard automatically by them.

The Congress should realize that over 75 percent of the cases are desertion or a. w. o. l. and there are very few points of law in them. I would think that the officers of the Judge Advocate General's Department would be much more

profitably employed in preparing cases for the Judicial Council. Why give the double review? The time consumed by the convening authority and these boards of review is a waste of time and money. Certainly the work of this court will not be greater than the United States Circuit Court of Appeals for the Second Circuit or of the United States Court of Appeals for the District of Columbia. If it is to receive the pay and rank of a United States circuit court, it ought to do the work of such a court. I am sure five judges could do it, sitting in panels of three judges as the circuits do. Why not do this? I cannot believe there is any merit in any suggestion that boards of review are necessary to cut down the volume of cases. Our board reviewed over 2,000 naval courts martial from April to September. It can be done adequately by a five-judge civilian court if it organzies right and goes to work.

Under the present uniform code, who can be sure he is given an unqualified right to bring his case to the Judicial Council? Unless you have been sentenced to death, the only ones who are given—under the uniform code—an unqualified right to have their cases reviewed before the Judicial Council are generals and admirals. I submit that this is contrary to the American system and that everyone regardless of rank should have his case automatically heard before this top civilian Judicial Council. Here again we see command influence in operation.

(*d*) The code lets the district attorney (Judge Advocate General) decide what cases to appeal to the Judicial Council.

The Judge Advocate General is not, and by the nature of his office and appointment, cannot be an impartial judicial officer. He is in as inconsistent a position as a commanding officer or convening authority. He is to enforce discipline and he is to give defense. It is for this reason that the English in their reforms have provided that the Judge Advocate General be a civilian appointed on the recommendation of the Lord Chancellor and be responsible to him.

Significantly, in order to reduce this conflict the English have removed the Judge Advocate General from the control of the Secretaries for State and Air. The Committee headed by Justice Lewis declared that the prosecuting and defense sides of the office of the Judge Advocate General office must be completely separated. This recommendation of the Lewis Committee follows and approves the similar recommendation of the prior Oliver Committee. And the recommendation has actually been put into effect. (See Report of the Army and Air Force Courts-Martial Committee of 1946, published in January 1949, prefatory note and pars. 107 and 109 and 115 to 120.) The prosecution seems to be placed under the Adjutant General of the British Army for purposes of discipline and general administration. And the English have under consideration changing the name of their judge advocate to "chief judge martial" since in the future his duties are to be purely judicial and his title is "confusing and misleading." (See pars. 30 and 114 of the Lewis Committee.) The English also are considering changing the name of the trial "judge advocate." The suggestion is to call the trial judge advocate of "judge martial," or "deputy judge martial." (See par. 197 of the Lewis Committee report). This present reform carries out the program of the Oliver Committee appointed when the English Prime Minister was a Conservative.

To all intents and purposes there is no difference between the Judge Advocate General and a district attorney in civilian life. Yet, despite this basic conflict of interests, the uniform code in article 67 (b) (2) provides that the Judge Advocate General may order forward to the Judicial Council for review such cases as he pleases. This strikes me as very bad. This means that if you are given a death sentence or you are a general or an admiral or you are a man whose case interests the Judge Advocate General, you can have your case appealed to the three civilian judges appointed by the President.

From what I have seen of review of courts martial, I say to you that the time has come when review should be given to every case equally and without depending upon the action of anyone. When national defense is so necessary that we have to have large citizen armies, the least that this Congress can do for the parents of American youth is to see to it that the case of every one of them who is convicted be reviewed before a top civilian court. I say expand the Judicial Council to five judges and give review to everyone alike.

(*e*) The code provision for review by petition is a phoney. It is for the wicked and well-connected, not for GI Joe.

There is a third way by which a case can be reviewed by the Judicial Council after it has been unnecessarily reviewed by the convening authority and a board

of review in the offices of the three Judge Advocates General. Article 67 (b) (3) provides that upon petition of the accused, the Judicial Council can grant a review. I call your attention to the fact that the code significantly does not tell us who is to make this petition. In my short tour of duty with the Navy, I saw the cases of very few defendants that were highly educated men. They were very young men, and in most cases very poorly educated men. They were men who were in trouble largely because of bad home environment. They were the children of divorced parents, and the real poor and neglected in America. These men, if they are to exercise the right to appeal, to file a petition to the Judicial Council, will have to have assistance. The only ones who will not require assistance are the wicked and the well connected. This method of providing an appeal by petition will result in the wrong kind of cases going to the Judicial Council and the right kind being buried in the board of review in the office of the Judge Advocate General.

(*f*) The code does not provide for a chief defense counsel.

To be sure that every case is presented to the Judicial Council, it was the suggestion of our board, based on our experience in reviewing the cases, that there should be created a chief defense counsel (Keeffe report, p. 254). Such an officer, and not the Judge Advocate General, should have the responsibility of appealing cases to the top civilian court. It is too much to expect any Judge Advocate General, no matter how well-intentioned and no matter how capable, to act in two capacities like Pooh Bah. It is like asking the district attorney to appeal the case of a defendant that he has convicted. If we have a chief defense counsel appointed by the Secretary of Defense, there is good reason to suppose that the chief defense counsel will present to the civilian court the points that should be present in the defense of every man convicted by a court martial. If he fails to do so, he has failed to do his specific duty.

(*g*) The code does not insure appeal to the United States Supreme Court for GI's and gobs.

Furthermore, in our report we called attention to the fact that throughout the war there were no cases appealed to the Supreme Court of the United States with respect to any American boy. It is a curious thing that our highest court has heard cases with respect to Yamashita, Homma, and the German saboteurs, but not one case—except for the recent Hirshberg case—of an American boy.

In my judgment this is one of the greatest reflections upon the American court-martial system and in my judgment we will never have cases appealed to the Supreme Court of the United States unless we have a chief defense counsel charged with the duty of appealing to the Supreme Court of the United States such cases as in his judgment he deems appealable. It is not that the services are opposed to giving an enlisted man a fair trial. The vice is that the system lodges appeal in the Judge Advocate General. If the system were changed so that a chief defense counsel were charged with this duty, he could be depended upon to do it. I have the highest respect for the officers of the armed services and I know no body of men that can be better trusted to do their duty. However, it might be well to have the chief defense counsel a civilian. Once we change this court-martial system so that a chief defense counsel is created and is free to act, we will see appeals brought to the Supreme Court of the United States from courts-martial convictions as they should be, instead of being buried in the offices of the Judge Advocate General. The convictions that we have read about at Litchfield, the recent convictions that we have read about in the American district in Germany, arising out of the Malmedy massacre (see New York Times for Wednesday, March 2, 1949), indicate that there are cases that should be brought to the Supreme Court of the United States. In my own experience, we had a group of cases involving alleged rape in the sugar cane in Hawaii which should have been appealed to the Supreme Court of the United States and were not. In fact, the recommendation of Felix Larkin, Esq., and myself that the convictions in those cases be set aside has not yet, so far as I know, been followed, and our request that those cases—in the event conviction was not set aside—be referred for study by a committee of the American Bar Association has not been honored. There were other cases that our board reviewed involving difficult judicial points which should have been reviewed in the Supreme Court of the United States and were not. Mr. Larkin and I made similar recommendations in respect to these and, so far as I know, nothing has been done to set aside the sentences. Clemency was extended, but the conviction remains and this is a great injustice.

Defense counsel is an absolute necessity. Along with the creation of such an office should go a change in the outmoded method of appeal of a court-martial case into the Supreme Court of the United States. Such cases cannot be appealed except by filing a writ of habeas corpus in a district court of the United States and appealing from the district court to the circuit and then applying by writ of certiorari to the Supreme Court of the United States. Our board asked hat this be corrected, but nothing has been done so far as I know and this code does not change matters (Keeffe report, pp. 261–253). The least that should be done is to give the chief defense counsel the right to appeal to the United States Court of Appeals for the District of Columbia or directly to the Supreme Court of the United States by certiorari.

(*h*) Having sabotaged the Judicial Council in limiting its right to hear appeals in every case, the code completes the job by limiting it to points of law only.

Another difficulty in the Judicial Council, as set up on the present code, is the fact that the Judicial Council can review only matters of law. The experience of the Army with its boards of review has been very bad. It has been difficult, if not impossible, to tell what is a question of fact and what is a question of law. The result is that review by the boards of review of the Army has been particularly criticized. The present code permits an unlimited review before the boards of review, but in creating the new Judicial Council, it perpetuates the vice that was present in the old Army boards of review. It limits the Judicial Council to review questions of law and chains the Judicial Council to the facts as found by command. This is not the kind of civilian review that we ought to have. We reviewed cases where we thought that confessions had been extorted from the accused by torture. Is the obtaining of a confession by extortion a question of fact or a question of law? Cases of that sort are bound to be difficult to review and the statute should be drawn so that the Judicial Council has an unlimited right to review questions of fact as well as questions of law. (See Article by Samuel Morgan, December 1946 Atlantic Monthly, and Keeffe report, pp. 226–227.)

*3. The only hope for real reform of courts martial is to create an advisory council.*

From what I have said, it seems clear to me that there is no hope for an adequate thorough-going reform of the court-martial system unless a permanent advisory council is created as suggested by our board (Keeffe report, pp. 2–5 of introduction) and the American Bar Association.

The hope of those in the armed services who oppose reform is that those of us who are informed and interested will lose interest and tire out. It is a severe personal sacrifice for busy lawyers and busy men to take the time that is necessary to present the civilian point of view on reform to the Congress. The Congress should recognize that we are a scattered group and the matter should not be left in this way. The American Bar Association proposes, in line with the suggestion of our board, that there be a permanent independent advisory council of lawyers appointed by the President. Over and above every other reform, I again urge upon you the importance of creating this advisory council so that the disinterested opinions of men like Vanderbilt and McGuire and the rest can be brought to your attention.

NOTE

I call the attention of the committee to article 106 of the uniform code under which, as I read it, any person in time of war becomes subject to court martial. Article 106 applies by its terms to any person who is "in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in and of the prosecution of the war by the United States." Unless this it not "time of war" as meant by article 106, it would take effect today on enactment. In any event during the last war it would be difficult, it seems, to find anyone in the United States not subject to this broad and dangerous language. With double jeopardy the vogue then, most civilians in wartime would be subject to both civil trial and court martial. This language should be torn out by the roots.

Senator KEFAUVER. We have in order on the list Maj. Gen. Thomas H. Green, Judge Advocate General of the Army. I want to make it clear that General Green is appearing here upon the request of the committee as are the other judge advocates general who will appear this afternoon.

## STATEMENT OF MAJ. GEN. THOMAS H. GREEN, JUDGE ADVOCATE GENERAL OF THE ARMY, WASHINGTON, D. C.

Senator KEFAUVER. We would be glad to hear you. Do you have a statement?

General GREEN. Yes, sir. I would like to have it clear that I am here at the request of the committee and with the approval of the Department of the Army; and the views that I am expressing are my own personal ones and not necessarily those of the Department of the Army.

Senator KEFAUVER. Yes. We understand that, and that you were requested. You did not ask to appear, but the committee invited you to, and we were anxious to have your viewpoint on your own behalf representing your personal viewpoint.

General GREEN. I have a prepared statement, Senator, which I would rather not read.

Senator KEFAUVER. That will be filed and made a part of the record at this place in the hearings, and it will be considered, of course, by the committee; and you may make any oral statement in connection with it that you wish to.

(The statement is as follows:)

STATEMENT OF MAJ. GEN. THOMAS H. GREEN, THE JUDGE ADVOCATE GENERAL OF THE ARMY

Mr. Chairman and gentlemen of the committee, I appreciate this opportunity of appearing, at your request, to express my opinions as to H. R. 4080. At the outset I would like to make it clear that I am not speaking for the Department of the Army. I am merely expressing my own views, which, however, also represent the considered opinion of many of the officers of the Judge Advocate General's Corps who have devoted many years to the study and practice of military justice.

I am in favor of a Uniform Code of Military Justice and so advised the Armed Services Committee of the House of Representatives in 1947 when it considered the amendments to the Articles of War which were enacted by the last Congress. I could not agree with any principle of uniformity which involves backward steps in the insurance of essential justice or deprives the three services of their own basic disposition of their individual disciplinary problems.

The object of a code of military justice must be to further the mission of the armed forces, which is to fight and win wars. In its operation it must be both military and just. If it is not military it will be an impediment to the force which it is intended to support. If it is not just, it will have a deleterious effect on morale and thus tend to destroy the fighting effectiveness of an army. The Articles of War which were enacted in 1920 and amended in 1948 have been calculated to attain these objectives. The provisions of the present Articles of War have been the result of an evolutionary process of study, administration, trial and error over many hundreds of years. I believe they have attained a harmonious combination of procedural and substantive law which is military and which preserves to the soldier every constitutional safeguard of due process. In most respects military due process accords to an accused person more safeguards than he would have a civil court. As far as the effectiveness of our system of justice is concerned I would like to quote from the report of the War Department Advisory Committee on Military Justice which recommended the substantial changes made by the last Congress:

"* * * the Army system of justice in general and as written in the books is a good one; that it is excellent in theory and designed to secure swift and sure justice; and that the innocent are almost never convicted and the the guilty seldom acquitted."

The committee found certain defects in the operation of the system, however, the most important of which pertained to the improper influence of commanders upon courts primarily with respect to the severity of sentences. These defects have been corrected by the Elston bill or Kem amendment and by the

Manual for Courts Martial. Commanders are expressly forbidden to censure, reprimand, admonish, or unlawfully influence a court or any member thereof with respect to its or his judicial functions. The manual expressly enjoins courts to exercise their own judgment with respect to sentences and not rely upon the reviewing authority to cut down a sentence which the court itself believes to be excessively severe.

I think our present statute is an excellent one, and the entire Army is cooperating to the fullest extent in its operation. I hope you will let us keep it long enough to prove its worth.

The proposed code has many excellent features. It is logically organized and preserves many of the desirable features of the present Articles of War. In particular I would like to commend the draftsmen for their improvement and clarification of article 2 (11) which deals with jurisdiction over persons serving with and accompanying the armed forces in the field in time of war; article 4 which deals with the right of officers dismissed by the President to trial by court martial and provides for a constitutional disposition of such cases; article 32 (d) which provides that minor defects in pretrial investigations are not jurisdictional and thus anticipated the view of the Supreme Court recently expressed in the case of Humphrey versus Smith; article 52 which removes ambiguities of the present A. W. 43; and article 74 which clarifies the remedial action to be taken as the result of a new trial in which the former sentence is not sustained.

But the code has many defects. I will not take the time of the committee at this juncture to discuss in detail each of the provisions which in my opinion will not only impair the functions of military justice but also diminish the substantial rights of accused persons. With the permission of the committee I would like to furnish a more detailed analysis. I would like, however, to dwell on some features which I regard as fundamental. These are:

1. The sweeping extension of military jurisdiction over civilians (arts. 2, 3).
2. The limitations on the powers of the law member (arts. 26, 39).
3. The mandatory requirement that the officers conducting the prosecution and the defense shall be lawyers certified as qualified by the Judge Advocate General (arts. 27, 38).
4. Wide extension of the powers of boards of review with respect to nonlegal matters.
5. The creation of a civilian court of military appeals.

### 1. EXTENSION OF MILITARY JURISDICTION OVER CIVILIANS

It has long been recognized that nonmilitary persons who travel and serve with an army in the field must be subject to the discipline of the army, else their conduct can seriously affect the security and discipline of that force. Consequently, such persons have been subject to military law since the articles enacted by the Continental Congress. When, however, there is no exigent need for the exercise of military jurisdiction over civilians, Congress has been very zealous to preserve civilian jurisdiction.

Insofar as Army and Air Force personnel are concerned, articles 2 (3) and 3 (a) of the code extend military jurisdiction over persons not now subject to it. I believe this is unnecessary and the inevitable result will be public revulsion against its exercise. It has been my experience that no matter how just and fair the system of military justice may be, if it reaches out to the civilian community, every conceivable emotional attack is concentrated on the system. This is as it should be. The framers of the Constitution recognized that civilians should be tried by civilian courts and they established a military system of courts for the Army and Navy. I recognize that reservists on inactive duty training may commit offenses, perhaps serious ones. I also recognize that many serious offenses committed by persons subject to military law are not detected until the person is separated from the service. I do not advocate that such persons should go unpunished. I merely suggest that you confer jurisdiction upon Federal courts to try any person for an offense denounced by the code if he is no longer subject thereto. This would be consistent with the fifth amendment of the Constitution.

Article 3 (a) is particularly unworkable. It provides that, subject to the statute of limitations, any person charged with having committed an offense against the code, punishable by confinement of 5 years or more and for which he cannot be tried in a Federal or State court while in a status in which he was subject to the code, shall not be relieved from amenability to trial by courts

martial. The question as to whether he can be tried by a Federal or State court for the offense becomes a jurisdictional one. It may be hard to decide. In *U. S.* v. *Bowman* (260 U. S. 94), the Supreme Court held that any offense directly injurious to the Government for which Congress provided no territorial limitation may be tried by a district court no matter where the offense is committed. Whether a particular offense comes within this limited category is a fit subject for debate among lawyers. It may not be settled except by the Supreme Court. It is not a proper subject for determination by a court martial. If you expressly confer jurisdiction on the Federal courts to try such cases, you preserve the constitutional separation of military and civil courts, you save the military from a lot of unmerited grief, and you provide for a clean, constitutional method for disposing of such cases.

### 2. LIMITATION ON THE POWERS OF THE LAW MEMBER

Article 26 creates the position of a law officer. This officer, unlike the law member appointed pursuant to A. W. 8, is not a member of the court. He may rule on interlocutory questions, instruct the court as to the presumptions of innocence, and assist the court in preparing the formal findings after the actual findings have been made, but he is deprived of his vote and excluded from the closed sessions of the court. This results in the loss of legal experience and learning during the most critical stage of the proceedings and deprives the court of legal guidance at a time when it most urgently requires such guidance. The requirement of the Kem amendment that a law member be a lawyer and that he participate in all proceedings of a court martial is regarded by all who have had experience in the administration of military justice as the most significant improvement since automatic appellate review. The limitation on the effectiveness of the law member will result in miscarriages of justice both to the detriment of accused persons as well as to the detriment of the interests of the Government.

The only argument for the change which I have been able to discover advanced by the proponents of the bill is that it is desirable to have the law member's instructions appear upon the records. I have no objection to that. The present Manual for Courts Martial requires that the law member's instructions be given in open court.

Professor Morgan, for whom I have a great deal of esteem, justified this provision to the House Armed Services Committee as follows:

"The charge which he gives them will be on the record—everything that he gives in open court will be on the record. When they go back to deliberate they are like a jury and there is no particular record with reference to that.

"The law member, when he retires with the court, may make any kind of statement to them. And it has been stated—I would not say on how good authority—that frequently when he went back there why he said, 'Of course the law is this way but you fellows don't have to follow it'" (hearing on H. R. 2498, p. 607).

I doubt if any lawyer law member ever said a thing like that. The presence of the law member in the closed sessions is infinitely more likely to prove a deterrent against the expression of such a sentiment by anyone.

The analogy between the proposed law officer and a civilian judge is more apparent than real. For example, he rules subject to objection by any member of the court on the question of a motion for a finding of not guilty under article 51. Suppose that he has ruled, as a matter of law, that the prosecution has not proved a prima facie case and a member objects to his ruling. Under the proposed code the court closes—excludes the law officer—and votes on this legal question. The law officer cannot explain his ruling, defend it, or vote to sustain it. Although under A. W. 31 such a ruling by the present law member is also subject to objection at least he can defend his ruling against the argument of a member who may not be well versed in the law. I don't believe this change which makes the law member a mere figurehead is defensible.

### 3. MANDATORY REQUIREMENT FOR LEGAL QUALIFICATION OF COUNSEL

Article 27 requires that the trial counsel and defense counsel of each general court martial must be a qualified lawyer and certified to be competent to perform his duties by the Judge Advocate General. If their assistants are to perform in any capacity other than in a merely clerical one, they too must be so qualified under article 38.

A. W. 11 of the Kem amendment now provides that if the trial judge advocate is a lawyer, the defense counsel must also be a lawyer. This is a fair rule and corrects many of the defects in the former system justly criticized by the public and the legal profession. In the Army we now have approximately 6,000 general court martial cases per year. In time of war we have many more. I would say that fully 70 percent of these cases involve extremely simple issues which can be adequately and fairly tried by line officers. I would like them tried by lawyers, it is true, but the difficulty of procurement of sufficient lawyers to provide at least three for every one of 6,000 general court-martial cases is enormous. If I am to certify each one as qualified I will have to satisfy myself that he is qualified to try any kind of a general court-martial case, not just a simple a. w. o. l. or desertion case which rests on a morning report. I can't just certify every lawyer no matter what his trial experience or criminal law background may be. If bar membership were the only qualification necessary, why would Congress require me to certify the lawyer's qualifications? Where can I find lawyers so qualified in sufficient numbers to try 6,000 cases a year? Unless I find them, the few lawyers I have will have to try the cases, simple and difficult, to the exclusion of all other duties which may be more important to the Government than the trial of simple cases which could as effectively be tried by line officers—or lawyers learning military justice. The inevitable result will be long delays in the disposition of cases pending the procurement of three lawyers at the right time and place. Some cases are long and difficult. While a team of three lawyers is trying a case which takes weeks to try, many accused whose cases could be disposed of in an hour or less will be waiting in a guardhouse until their cases can be reached. I don't think this is the result you want to attain. I don't think it's necessary because there will be a trained and experienced law member on the court to see that the rights of the accused are protected in even a simple case. In addition, the review of the staff judge advocate and automotic appellate review will protect the accused's substantial rights against the errors of counsel. The practical difficulties of the article could be ameliorated if you gave the accused, at his option, the right to be defended by a lawyer provided by the appointing authority even though the trial judge advocate is not a lawyer. I would also have no objection if the requirement of the proposed article 27 were limited to cases in which the death penalty or confinement in excess of 10 years might be adjudged.

#### 4. POWERS OF THE BOARD OF REVIEW

Article 66 (c) provides in part that the board of review "* * * * shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."

Under articles 66 and 67 the determination of the board of review is final as to any matter other than a question of law. The latter is subject to appeal to the Civilian Court of Military Appeals either by the Judge Advocate General or the accused. This in effect authorizes the board to disapprove or mitigate legal sentences which have been approved by responsible senior commanders. It authorizes them to consider other than legal matters in determining what part of a finding or the sentences should be approved. For example, a board may consider that a given order which an accused is charged with having violated is unwise, and that therefore, on the basis of the entire record, a finding should be disapproved. This makes possible an unwarranted invasion of the command prerogative and would authorize the board of review to substitute its judgment on military policy for that of the commander in the field. This determination under the proposed bill would be absolutely final. I could not appeal that case to the Court of Military Appeals because the board's determination would not be based on a question of law.

Under the present case load in my office I have six boards of review. I may soon need more. Under the proposed bill I would need even more. The members are bright, well-qualified, and conscientious military lawyers. They have experience both as soldiers and as lawyers. Many of them are relatively young. They function well in determining legal sufficiency of records and in weighing evidence. They have not all, however, attained the wisdom in matters of policy which comes with experience and age nor have they all attained the instinctive familiarity with military matters which comes with many years of experience with troops. The powers which article 66 gives them have heretofore been exercised by the confirming authority, i. e., the President, the Secretary, or the Judicial Council and the Judge Advocate General—all of whom have far

greater responsibility with respect to the accomplishment of the military mission than do the boards of review. I believe it unwise to entrust such sweeping powers to such relatively younger officers or civilian employees (as authorized by the code). I must use younger officers on these boards, because I can't concentrate all my older and wiser heads in Washington. Some of them are needed in the overseas theaters and other commands where difficult military legal problems arise. And even in Washington I have to use senior officers to head my Claims, Military Affairs, Contracts, Procurement, and Patent Divisions. Under the proposed article 70 I would have to provide an undetermined number of my ablest appellate officers as appellate Government and defense counsel to represent the Government and the accused before boards of review and before the Court of Military Appeals. In spite of the fact that the proposed bill will increase somewhat the number of cases to be examined by a board of review, the Judge Advocate General will have to reduce the number of boards because of the especially high qualifications these extended powers will demand and because the increased demand for the services of my most qualified officers to fill other positions. This too will delay the disposition of cases.

The bill proposed by Professor Morgan's committee had a remedy for this provision: It authorized the Judge Advocate General to refer a case to another board of review if he was dissatisfied with its holding. This was somewhat unjudicial and the House committee struck it out—wisely, I think. It did, however, point out the extremely critical problem. Some judicial remedy should be provided. I urge you to leave the power to commute and consider nonlegal matters with a confirming authority and to authorize the Judge Advocate General to dissent with the board and refer any case to a higher confirming authority or a military Court of Military Appeals. This brings me to my final major point of disagreement.

### 5. CIVILIAN COURT OF MILITARY APPEALS

At the outset I would like to state that I am in accord with the underlying principle of article 67 (g) which provides for a continuing study of military justice matters to be conducted by a body of eminent jurists in conjunction with the Judge Advocates General of the services and annual report to the responsible Secretaries and the Congress. The remarkable accomplishment of the Vanderbilt committee clearly demonstrates the usefulness of such a study. It provides helpful liaison with the legal profession. It would ultimately lead to further perfection of the system of military justice.

But with respect to a wholly civilian court of military appeals I cannot agree. Military justice is a field of the law which requires not only a thorough familiarity with criminal law, but also experience and training in military matters. You would not entrust a complicated patent problem to a tax lawyer who was not thoroughly familiar with the engineering or other technical matters involved no matter how good a tax lawyer he might be. The capstone of the system of military justice should consist of those military lawyers who are most highly experienced and trained both from a military and a judicial viewpoint; both as soldiers and as judges. The legal services of the Army, Navy, and Air Force have produced such judges and are ideally organized to produce more such judges. This requirement can't be met merely by providing that the civilian Court of Military Appeals will consider only questions of law. Every lawyer knows that questions of fact and questions of law cannot be separated in airtight compartments. Military law in itself embodies hundreds of complicated problems of status arising out of customs of the service as well as statute and regulation.

In the files of my office there is a case of a corps artillery group commander who was tried for the willful disobedience, before the enemy, of a division commander's orders to go into a particular position with his battalions and stay there. In the heat of the battle his group left that position. He contended that he was going to an alternate position from which he could more effectively accomplish his mission. Among the issues in the case was the question of whether he was attached to the division or merely supporting it. This involved both a question of fact and of military law. If he was merely supporting the division, to what extent did the division commander have authority to order him to stay in a position which he considered poor; if he was attached, to what extent did the group commander have discretion in exigent circumstances to leave a position given him by the division to go to another one of his own choosing?

These are all problems which required a thorough and detailed knowledge of tactical organization, the legal effect of a corps standing operating procedure, and customs of the service in general. What special qualifications do civilians without extensive military experience have to determine such questions? I can cite you many such cases. For instance, is an air base several hundred miles from a target "Before the enemy"? And consider the purely military legal problem presented by *Wade* v. *Hunter* as to whether military exigency constituted imperious necessity with respect to former jeopardy. These are problems which ultimately would be resolved by the Court of Military Appeals.

Is there a need for such a court? Has the administration of military justice broken down at the appellate level? I submit that there has been no such failure. The opinions and holdings of the boards of review since their creation in 1920 constitute one of the most comprehensive bodies of criminal reports in the United States, reports which compare favorably with those of both Federal and States appellate courts. The remarkable success of the military appellate system is attested to by the fact that, out of more than 200 habeas corpus cases arising since World War II only 1 accused has been released from confinement as the result of final court action on his petition. The grounds upon which the one exception was released was overruled by the Supreme Court of the United States 2 weeks ago in *Humphry* v. *Smith*. I am proud of that record.

Under our present system the most serious cases such as those involving death sentences, life imprisonment, cases involving general officers, and cases extending to dismissal of officers go automatically to the Judicial Council created by the Kem amendment for confirming action. Other cases where either the Judge Advocate General or the board of review believes that confirming action should be taken in the interest of justice may also be referred to the military Judicial Council. The case load is sufficient to keep the Council busy but not enough to create a bottleneck. Under the proposed bill only death cases and cases involving general officers will go to the Court of Military Appeals automatically but each accused will have a right to petition for review by that court. I think it has been estimated that in peacetime in 85 percent of 14,000 cases, or in almost 12,000 cases, the accused will have a right to petition the Court of Military Appeals for review. I think it fair to assume that a substantial percentage of those 12,000 accused will exhaust their remedy. Although only a small percentage of those cases may result in review, the task of considering the petitions themselves will be enormous. If the Court of Military Appeals of three judges gives the consideration which each petition deserves, it is self-evident that substantial and deleterious delays will occur.

I think I have demonstrated that there is no need for further review for legal sufficiency of records after military appellate review. Under the uniform code there is unquestionably a need for uniformity of sentences and uniform interpretation. Our present system is working well in the Army, and, as far as I know, in the Air Force. It can be extended, with modification perhaps, to fit the needs of the other services. It preserves to each service the control of individual cases within the service. I recommend that our system be preserved. In order to provide for uniformity of sentences and of interpretation I would suggest that there be established in the National Military Establishment a military Court of Military Appeals composed of the Judge Advocates General of the services. Their function, together with a civilian advisory body, should be to recommend uniform policies of punishment and improvements in the administration of military justice. To provide for uniformity of interpretation, each Judge Advocate General should be empowered to certify any case for legal determination by the entire Court of Military Appeals whenever uniform legal interpretation is required.

The proposal I make would preserve the advantage of completely automatic appellate review for all cases of the same class, which is perhaps the most important right of an accused in the military service and which is not accorded him by civil jurisdictions. It also preserves to all appellate agencies the power to weigh evidence and determine controverted questions of fact which are powers not generally exercised by civil appellate courts and which afford to an accused person rights which no other judicial system does. It would preserve the significant reforms in the administration of military justice made since 1920. Finally, by retaining the military judicial council created by the Kem amendment, it would provide a career incentive which will attract able lawyers to the military service to perform the many functions which the bill requires.

There are other provisions of the proposed code with which I cannot concur. The right against self-incrimination provided by the code (art. 31) abridges

the right which persons subject to military law now have under article of war 24; provision is made in article of war 43 for virtually doing away with the statute of limitations; many of the punitive articles are inartfully drawn. With respect to the punitive articles the House committee has corrected a few of the glaring errors by amending article 77 (principals) and article 119 (manslaughter), but larceny (art. 121) and robbery still require careful consideration. With your permission I should like to submit an analysis of my objections and to submit for your consideration pertinent amendments. I again wish to tell you that I appreciate the opportunity to present my views. I thank you.

General GREEN. I should like to make the following further oral statement. I should like to express myself on three points in the proposed bill.

The first one concerns the plan which excludes the law member from exercising the full powers of a member of the court. It has been our experience since 1920 that the law member as he is now constituted, who is a full member of the court, has done much to bring about real justice and appropriate judicial procedure.

The law member, in my estimation, is the best qualified man to determine evidence and he is a full member of the armed services. Now, as I understand it, the only purpose of this amendment is to have his rulings on law made of record, both when the court is closed and when the court is open.

I think this can be readily accomplished without impairing his usefulness. I think having him sit outside with the reporter while the court makes its determination is not getting the maximum value out of its law member.

There is a further practical reason why I do not favor this proposal. I have this thought: I have a good many younger officers who are fully qualified lawyers and in every way competent to sit as law members of a court. Now, when they get into a court martial, and they have a senior line officer in charge of the court, there is bound to be a cleavage there, and any cleavage will not be to the best interests of the Army, either the line or my department.

I have not yet seen any real advantage to this proposal. Would you want to question me on that?

Senator KEFAUVER. What do you recommend we do with the law officer, give him full participation and vote?

General GREEN. I recommend that you retain the Army provision—that is, to say that he is the law member of the court and a full member in every other respect.

Senator KEFAUVER. That is the same as the Elston bill?

General GREEN. Exactly.

Senator KEFAUVER. Being a layman only, I assume the idea was to have him in the nature of a judge charging the jury to inform the other members of the court as to the legal principles involved and then let them decide the issues of fact; that if he participated actively voting, in a good many cases it would be actually his decision and because of his superior knowledge and experience he might make his opinion that of the court.

What has been your experience in that regard?

General GREEN. It does not work out that way in practice. My thought is that he is also an Army officer. You see, it is a little bit different. This proposal perhaps was taken from the British system.

In the British system they have no lawyers in the Army. They have civilian lawyers from the headquarters which they send down.

Those men are experts on the law and are not experts on the law and the military at the same time.

Senator KEFAUVER. Do you feel that the law member participating fully is a protection to the accused?

General GREEN. I do; yes. I think he would lose something if the most qualified man to judge evidence is not permitted to vote.

Then, again, there is division of responsibility. You have two interests there, one from the line and one from the law, as it is laid out here. I think there should be one interest: the trial and the determination of the true facts in the case.

Senator KEFAUVER. Do you have any questions on this angle of the matter?

Mr. GALUSHA. No; I have none, sir.

General GREEN. My second point is the proposal to authorize the board of review to overrule field commanders. They now have and should continue to have the right to determine the legal sufficiency of a record of trial and to overrule it whenever they find the record legally insufficient, but to permit them to go further than this and overrule the military commander on policy and other matters as to sentence, and so forth—it is unnecessary and I think it would be very bad practice.

These men—in my service, at least—are the younger ones who are selected from those who are specially qualified by legal training rather than through mature military experience. I have six boards of review in my office, and as other jobs demand older and more experienced men the number of older and experienced men on the board of review is not as great as I should like to have.

I feel that there should be in the board of review the right to overrule the commander for legal insufficiency, but as to any other basis, I think that level is too low. I think it should be put at the point where we now have our Judicial Council.

Now I would like to say a little about our Judicial Council as it is now operated. It is comprised of three general officers.

Senator KEFAUVER. Before you leave the board of review, just what power would you give the board of review?

General GREEN. The determination of legal sufficiency only. The commander should be overruled by the board for legal insufficiency of the record, but not in other respects.

Senator KEFAUVER. What other grounds would there be?

General GREEN. The board might not like the extent of the sentence. It might agree that this man never should be tried. The member might say: "I think I would not have tried him were I the commander." They are not the commander. I think this responsibility is very great and the power to overrule the military commander on a question of the discretionary propriety of bringing accused to trial and the extent of sentence should be lodged only in the higher authorities who share the responsibilities.

Senator KEFAUVER. Is that not legal sufficiency?

General GREEN. No, sir. If it is not legally sufficient in law. The boards do now have authority to overrule commanders in matters of law but their action must be concurred in by the Judge Advocate General.

Senator KEFAUVER. Refer on page 54, General Green, to the sentence beginning on line 2 [reading]:

In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact recognizing that the trial court saw and heard the witnesses.

Do you think that gives the board of review too much leeway?

General GREEN. No; I do not. I think that is all right. But that goes to legal sufficiency.

Look on page 53:

It shall affirm only such findings of guilt and the sentence or such part or amount of the sentence as it finds correct in law and fact and determine on the basis of the entire record should be approved.

That would give the board of review, which is on a relatively low echelon, the power to determine whether or not the findings and sentence are appropriate.

Senator KEFAUVER. All right, sir.

General GREEN. I think this power should be on a higher level, that is all. I do not quarrel with the proposition that at some point the sentence should be considered, but I think this level is too low. As it now stands, I feel that any overruling should be on the Judicial Council level.

Our present Judicial Council is comprised of three general officers, each of whom has had more than 30 years of experience in the Army. They are men of mature judgment, with broad legal as well as military experience.

Their judgment serves to coordinate the sentences of the various commanders in the Army under policies set by the Secretary of the Army and the Chief of Staff. I think this is the lowest echelon in which a commander should be overruled except on grounds of legal insufficiency.

My third point is the proposal for the creation of a civilian court of military appeals. There has never been any difficulty on this score of determining the law. In cases of doubt we make reference to the Attorney General, and we are bound by the decisions of the Federal courts—all of the Federal judiciary.

Now our corps has, and does, determine the law for the Army in cases involving millions of dollars worth of claims and all sorts of controversies, rights, and interests of the Army, including the legal rights of accused persons. It operates without the benefit of any civilian corps to supervise it.

We have been highly successful for a great many years in our present system. Witness the fact—this is a very significant one—that since World War II we have defended our decisions on the law before the Federal courts, including the Supreme Court, in about 200 cases in habeas corpus. In all of those cases except one our views on the law finally prevailed. In the one case which we lost below the Supreme Court subsequently overruled the decision of the district court. We are very proud of that record.

As I read this proposal, the proposed court would not be a court at all. It would be at best an administrative board.

Now the Judge Advocate General's Office has the respect of personnel of the Army and of all the courts alike. Our opinions have been cited in the Supreme Court and lesser courts. I do not believe

this civilian court could excel the present system as to confidence of the courts or as to the confidence of persons who are being tried.

Now, it seems to me that in the interest of the four services there ought to be coordination. I submit this for consideration: That you provide a court of appeals comprising the three Judge Advocates General of the three services and the general counsel of the fourth, and have these men comprise a military court.

Now, this court would hear such cases as any Judge Advocate General, any of the three, or the general counsel, or the Secretary of any of the services, or the President might assign to it for coordinated determination as to common legal questions involved.

I have one further suggestion: That if the Congress decides that a civilian court of appeals is necessary and does not approve the suggestion I have just made, that some arrangement be made whereby similar references may be made to the Circuit Court of Appeals of the District of Columbia. There can be no question there.

The matter would then be in the judicial system. I feel that it could be done, and if the Congress feels so, then the Judge Advocate General of any of the services could refer to the circuit court of appeals any question involving purely a legal matter.

As to the determination of the facts, and the discretionary and nonlegal determination as to the propriety of the findings and sentence, I feel that a review such as we now have is wholly satisfactory.

I have noted a number of other relatively minor defects, and I would like permission to submit a further written statement of them, and also to sumit amendments which I recommend for consideration.

Senator KEFAUVER. It would be very helpful to the committee to have them, General Green. May I ask you one or two questions? You are familiar with the Spiegelberg American Bar Association recommendation that in cases where there is evidence that the commanding officer may be trying to influence the decision of the court, that provision be made for another court to try an accused—or rather from another outfit. What do you think of that recommendation? Is it workable and is it justified?

General GREEN. I did not quite get that.

Senator KEFAUVER. Where there is some evidence that the commanding officer or the commanding general is trying to influence the decision of the court, that upon that fact being recorded by the staff of the judge advocate, then the personnel of the court be selected by some other echelon or some other commander, other than the one in whose command the offense occurred.

General GREEN. I do not really believe that is operable. Under the present Elston bill, any improper interference by the military commander is prohibited. It is also prohibited by the manual which was approved by the President, and if it was a serious infraction it is the duty then of the Judge Advocate General to see to it that the case is "busted," as we call it, and that a new trial is held.

A perfect remedy as to that has been provided when you know of it. Now since February 1, I have gotten around a good bit to the various commanders. I feel that the allegation of interference by the commanders with courts has always been greatly exaggerated. There may have been some of it, and probably there were some instances of improper conduct, but it has been my experience that the military commanders are fully and thoroughly cooperative and the suggestions

made by my office have been fully complied with, or given full consideration at least.

You see, the difficulty is you just cannot legislate good conduct; and if a commander is going to do something that is illegal, anything that the Congress can put out in the way of law—it would be very difficult to stop him.

If you prohibit the general from talking or influencing his subordinates he would not act directly but if he wanted to do it he would do it through his aide or something of the sort. But I want to assure you that that is not the disposition of the commanders.

Senator KEFAUVER. This morning the suggestion was made by General Riter that this was the place where we should have unification, that we should have one Judge Advocate General for all of the services.

Do you think that would work, and what is your opinion of it?

General GREEN. Unquestionably it would work, but I think that is a policy matter for you gentlemen.

Senator KEFAUVER. Mr. Galusha?

Mr. GALUSHA. No questions.

Senator KEFAUVER. Will you give us any further statement that you have, or any amendments that you propose?

(The following material was submitted for the record:)

AMENDMENTS TO H. R. 4080 PROPOSED BY MAJ. GEN. THOMAS H. GREEN, THE JUDGE ADVOCATE GENERAL OF THE ARMY

Article 1. Definitions:

Article 1 (11) is amended to read as follows:

"'Accuser' shall be construed to refer to a person who signs and swears to charges, to any person who directs that charges be signed and sworn by another, and to any other person who has an interest other than an official interest in the prosecution of the accused."

The definition of "accuser" in H. R. 4080 appears to exclude from its scope the military superior who orders a subordinate to prefer specific charges. The Manual for Courts Martial, 1949, provides in part, "If a commander or an officer personally originates or drafts charges or causes them to be prepared nominally by another for him with the purpose of having them brought to trial, he is properly an accuser even though he may occupy no hostile or adverse position toward the accused (CM 328331, 1948)" (app. 1, p. 276, Manual for Courts Martial, 1949). Such an "accuser" should not be permitted to sit as a member of the court.

Article 1 (12) is amended to read as follows:

"(12) 'Judge advocate' shall be construed to refer to all officers of the Regular Army appointed in the Judge Advocate General's Corps, all non-regular officers of any component of the Army of the United States on active Federal duty assigned to the Judge Advocate General's Corps by competent orders, and all officers of the Air Force designated by the Chief of Staff, United States Air Force, as judge advocates."

In view of the recommendations I am making to retain the law member as a member of the court (art. 26), I recommend that the definition of "law officer" be deleted. Instead, I recommend that a definition for "judge advocate" be substituted so that there may be no doubt as to the status of such an officer. Although used in several articles (e. g., art. 6) the term is nowhere defined. By defining it here awkward explanatory provisions may be deleted from other sections of the code.

Although I am not prepared to suggest a definition, I recommend that consideration be given to defining the term "officer in charge" as used in articles 15 (c), 28 (b) (7), or 24 (a) (4). It appears that the Navy and the Coast Guard define this term differently. The Army sometimes refers to a staff officer as an "officer in charge" of his staff section. Staff officers are not commanders and should not have court-martial jurisdiction.

Article 2:

The prefatory statement is amended to read as follows:

"The following persons are subject to these articles and shall be understood as included in the term 'any person subject to the code'."

The opening paragraph of article 2 (H. R. 4080) omits the prefatory statement contained in article of war 2: "The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law.'"

Under the proposed code, and under the Articles of War certain punitive articles, such as Fraudulent Enlistment (A. W. 4, art. 83) and Spying (A. W. 8, art. 106) are applicable to "any person" not necessarily a person subject to military law under article of war 2. The prefatory provision of article of war 2 clearly implies that article of war 2 pertains only to those punitive articles which are made expressly applicable to persons subject to military law. The omission from the proposed code may be construed as omitting from the scope of the articles any person who does not fall within one of the categories enumerated in article 2.

Article 2 (3) is deleted.

I recommend that this section be deleted and that instead jurisdiction be conferred upon Federal courts to try offenses against the code committed by reservists on inactive duty training.

Article 2 (12) is amended to read:

"In time of war or national emergency, all persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States and the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands, except insofar as these articles define offenses of such nature that they can be committed only by military personnel."

"The proposed provision of H. R. 4080 is presumably patterned after title 34 United States Code, section 1201, which provides in pertinent part:

"In addition to the persons now subject to the Articles for the Government of the Navy, all persons, other than those persons in the military service of the United States * * * within an area leased by the United States which is without the territorial jurisdiction thereof and which is under the control of the Secretary of the Navy, shall, in time of war or national emergency, be subject to the Articles for the Government of the Navy, except insofar as these articles define offenses of such nature that they can be committed only by naval personnel * * *"

It is to be noted that article 2 (12) is not limited to time of war or national emergency, nor does it exclude purely military offenses. Its effect would be to make subject to military law, without limitation or qualification, any person residing in or visiting a base area at any time. The enactment of a statute conferring such sweeping jurisdiction over foreign nationals whose only connection with the armed forces might be that they are native or residents of an area leased to the United States, will inevitably lead to international complications.

It is also to be noted that title 34 United States Code, section 1201, limited in its application to time of war or national emergency and in its scope to nonmilitary offenses, is merely declaratory of the law of war. (See *Hammond* v. *Squier*, 51 Fed. Supp. 227.)

I recommend that article 2 (12) be amended to include the limitations of title 34 United States Code, section 1201.

Article 3 (a) is amended to read as follows:

"(a) Subject to the provisions of article 43, jurisdiction is hereby conferred upon the several district courts of the United States, without regard to the place where the offense was committed, to try—

(1) any person charged with having committed an offense against the code while in a status in which he was subject to the code which status has been terminated;

(2) any person of the reserve component of the armed forces for an offense against this code committed while such person is on inactive-duty training authorized by written orders which are voluntarily accepted by such person; and

(3) retired personnel of a regular component of the armed forces who are charged with having committed an offense against the code and who are entitled to receive pay.

The reasons for the proposed amendment are contained in my prepared statement.

Article 16 (1) is amended to read as follows:

"(1) General courts-martial shall consist of any number of members not less than five."

The proposed amendment is consistent with my proposal to amend article 26 to retain the law member as a member of the court.

Article 20 is amended to read as follows:

"Subject to article 17, summary courts-martial shall have jurisdiction to try persons subject to this code except officers, warrant officers, cadets, aviation cadets, and midshipmen for any noncapital offense made punishable by this code, but the Secretary of a Department, may by regulation prescribe that any person or class of persons who objects thereto shall not be brought to trial before a summary court-martial. Where such objection is made by the accused, trial shall be ordered by special or general court-martial, as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code except death, dismissal, dishonorable or bad-conduct discharge, confinement in excess of one month, hard labor without confinement in excess of forty-five days, restriction to certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay."

I do not believe it wise to give every accused the absolute right to demand trial by a higher court than a summary court martial. The punitive powers of such higher courts are greater and it is frequently to the advantage of an accused to stand trial before a summary court martial rather than before a general or special court martial. The right to demand trial by a higher court should be reserved to noncommissioned officers, but less well informed soldiers should be protected against their own folly. On the other hand, I believe that the right to demand trial by some court martial in lieu of nonjudicial punishment by commanding officers (art. 15) should be preserved to give a soldier who considers himself innocent an opportunity to make a defense. Since the right to demand trial in lieu of disciplinary punishment is left to departmental regulation by article 15, I am not proposing any amendment thereto. I am confident the Army will preserve that right. I understand that the Navy's problem is different. Accordingly, I recommend that the right to demand trial by a higher court, like that to demand trial in lieu of nonjudicial punishment, should be left to departmental regulation.

Article 26 is amended to read as follows:

"ART. 26. Law member of a general court-martial.

"The authority convening a general court-martial shall appoint as a member thereof a law member who shall be a judge advocate or a law specialist or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and who is certified to be qualified for such duty by The Judge Advocate General of the armed force of which he is a member. No person shall be eligible to act as a law member in a case in which he is an accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case."

The proposed amendment is calculated to preserve the effectiveness of the law members. The reasons therefor are stated in my prepared statement.

Article 27 (b) is amended to read as follows:

"(b) Any peson who is appointed as trial counsel or defense counsel of a general court-martial shall, if available, be a judge advocate or a law specialist or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States."

Article 27 (c) is amended to read as follows:

"In any case referred for trial before a general or special court-martial in which the officer who is appointed as trial counsel shall be a judge advocate or a law specialist or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States, the defense counsel appointed by the convening authority shall be one of the foregoing."

Article 27 is amended by adding thereto the following:

"(d) In any case referred for trial before a general or special court-martial in which the conduct of the prosecution devolves upon an assistant trial counsel who is a judge advocate or a law specialist or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States, and neither the defense counsel nor any of his assistants or individual counsel present is one of the foregoing, the proceedings will be adjourned pending procurement for the conduct of the defense of a defense counsel who is one of the foregoing, unless the accused expressly consents to proceeding with the trial in the absence of such legally qualified defense counsel."

The reasons for the proposed amendment to article 27 are stated in my prepared statement.

Article 28 is amended to read as follows:

"ART. 28. Appointment of reporters and interpreters.

"Under such regulations as the Secretary of the Department may prescribe, the president of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission. Under like regulations the president of a court-martial, military commission, or court of inquiry may appoint an interpreter who shall interpret for the court or commision."

The proposed article 28 of H. R. 4080 provides that the convening authority, instead of the president of the court, shall have power to appoint the reporter and interpreter. This provision may prove cumbersome with respect to courts sitting at a great distance from the headquarters of a convening authority. The need for an interpreter or a change in reporters may arise suddenly during the course of a trial. It is most convenient to vest the power to appoint reporters in some authority on the spot and not in someone who may be 500 miles away.

Article 31 (d) is amended as follows:

"No statement obtained from any person through the use of coercion or unlawful influence in any manner whatsoever shall be received in evidence against him in a trial by court-martial."

Article of war 24 provides that no person shall be compelled to incriminate himself and renders inadmissible any statement, admission, or confession which is involuntarily given no matter whether the person who obtained the statement is subject to military law or not.

I am afraid that article 31 (d) of H. R. 4080 might be construed to render admissible a confession obtained by civilian police under circumstances which might be construed as coercion but which do not constitute "unlawful inducement" in the State or foreign country where the statement was obtained. It would clearly render admissible a coerced confession obtained by foreign police if the coercion were lawful in the foreign country.

The amendment I am proposing would cure the defect and remove any ambiguity.

Article 39 is amended as follows:

"Whenever a general or special court-martial is to deliberate or vote, only the members of the court shall be present. All other proceedings, including any consultation of the court with counsel, shall be made a part of the record and be in the presence of the accused, the defense counsel, and the trial counsel."

The proposed amendment is consistent with my proposed amendment to article 26 retaining the law member as a member of the court.

Article 43 (b) is amended as follows:

"(b) Except as otherwise provided in this article, a person shall not be liable to be tried by court-martial for desertion in time of peace or any of the offenses punishable under articles 119 through 132 inclusive if the offense was committed more than three years before the charges therefor are referred for trial."

Article 43 (b) of H. R. 4080 provides a 3-year statute of limitations for peacetime desertion, felonies of a civil nature, and frauds against the Government. The time when the period of limitation will stop running is made the time when sworn charges are received by an officer exercising summary court-martial jurisdiction. Under A. W. 39 the time when the statute stops running is arraignment.

In the Army an officer exercising summary court-martial jurisdiction frequently exercises special or general court-martial jurisdiction. He may be a field artillery battalion commander or he might be an Army commander. Under article 43 (b) H. R. 4080 such an officer might receive charges appropriate for trial before a higher court which he has authority to appoint. He is under no duty to forward them to anyone else. He might simply decide that the charges do not merit trial and file them. Such charges might later be resurrected. Since officers exercising summary court-martial are not courts of records with dockets, time stamps, etc., which civilian lawyers are accustomed to in the office of the clerk of a court of record, I believe that the proposed statute of limitations is fraught with danger of serious abuse. I prefer that the statute of limitations stop running at a more definite stage of the proceedings. I believe that reference for trial is such a definite stage. It must come after an investigation into the nature of the charges and the available evidence, after consideration of the staff judge advocate, and after the determination of the responsible commander that there should be a trial. This is consistent with the Federal statute of

limitations which stops running after the indictment is found or the information is instituted (18 U. S. C. 3282).

It has been contended in favor of article 43 (b) that stopping the running of statute of limitations at arraignment might prevent the bringing of a fugitive to trial. I believe that article 43 (d) provides ample safeguards for the contingency. Furthermore, there is no reason why a case cannot be referred for trial even though the accused is a fugitive. It cannot be tried until he is found, it is true, but it is better to keep it in suspension after an investigation than before.

Article 43 (c) is amended as follows:

"(c) Except as otherwise provided in this article, a person shall not be liable to be tried by court-martial for an offense committed more than two years before the charges therefor are referred for trial, nor may he be punished under article 15 for an offense committed more than two years before the imposition of such punishment."

The proposed amendment is recommended for the same reasons as those advanced for article 43 (b).

Article 43 (d) is amended as follows:

"(d) Periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities other than Federal civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article."

Article 43 (d) of H. R. 4080 attempts to define "manifest impediment" to amenability to military jurisdiction provided in article of war 39. It would include periods during which the accused is in the custody of Federal authorities. I believe this is unjust since he would be amenable to military process if the United States desires to make him so amenable. Accordingly, I recommend that periods during which an accused is in Federal custody is not excluded from the running of the statute of limitations.

Article 51 (b) is amended as follows:

"(b) The law member of a general court-martial and the president of a special court-martial shall rule upon interlocutory questions, other than challenge, arising during the proceedings. All rulings shall be made in open court and recorded. Any such ruling made by the law member of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, shall be final and shall constitute the ruling of the court; but the law member may in any case consult with the court, in closed session, before making a ruling, and may change any such ruling at any time during the trial. Unless such ruling be final, if any member objects thereto, the court shall be cleared and closed and the question decided by a vote as provided in article 52, viva voce, beginning with the junior in rank."

The proposed amendment is consistent with the proposed amendment to article 26 retaining the law member as a member of the court. The requirement that all rulings shall be made in open court and shall be made a matter of record meets any possible suggestion that the law member may make rulings which do not appear on the record.

Article 51 (c) is amended as follows:

"(c) Before a vote is taken on the findings, the law member of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court—

"(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

"(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted;

"(3) that if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no such doubt; and

"(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government."

The proposed amendment is consistent with the proposed amendment to article 26 retaining the law member as a member of the court.

Article 54 (d) is amended as follows:

"(d) Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the trial counsel; in case

the record cannot be authenticated by the president and trial counsel, by reason of the death, disability, or absence of either or both of them, it shall be signed by a member in lieu of the president and by an assistant trial counsel if there be one, in lieu of the trial counsel, otherwise by another member of the court."

Article 54 (d) and H. R. 4080 provides that the president and law officer shall authenticate records of trial. Since, under article 38, the trial counsel prepares the record, I believe that he should participate in the authentication. He should have a more detailed knowledge of the accuracy of the record than any member of the court.

Article 57 (b) is amended as follows:

"(b) Any period of confinement included in a sentence of a court-martial shall begin to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement."

Article 57 (b) of H. R. 4080 provides that a sentence to confinement shall begin to run on the date adjudged except where the sentence to confinement is suspended. Under present administrative procedure in the Army all sentences to confinement begin to run on the date adjudged. A subsequent suspension interrupts the running of the period of confinement. I believe the present Army procedure is preferable and is probably what the draftsmen intended to accomplish. However, under the proposed article an accused would receive no credit for confinement served while awaiting the action of the reviewing authority if the latter suspends the confinement. If the suspension were later vacated in such a case the entire sentence would begin to run. This might result in an accused actually serving a sentence almost twice as long as that adjudged. I believe my proposed amendment clarifies the intent of the draftsmen.

Article 62 (b) is amended as follows:

"(b) Where there is an apparent error or omission in the record or where the record shows improper action by a court-martial with respect to a finding or a sentence, which can be rectified without prejudice to the substantial rights of the accused, the convening authority may, before appellate action on the record is completed, return the record to the court for appropriate action. In no case, however, may the record be returned—

"(1) for reconsideration of a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty; or

"(2) for reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of war; or

"(3) for increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory."

Article 62 (b) of H. R. 4080 is based on the second subparagraph of A. W. 40 and forbids reconsideration of a finding of not guilty or of a sentence with the view of increasing the severity thereof unless the court fails to adjudge a mandatory sentence. It fails, however, to reenact the provisions of article of war 40 (c) which authorizes revision of a finding of not guilty of a charge where the record shows a finding of guilty of a specification laid under that charge. The omission may require disapproval of records on the most technical grounds. The commentary to the proposed uniform code states that such reconsideration may be had under article 62 (b) but it is apparent that through inadvertence such power is not vested in anyone.

The proposed amendment cures the apparently inadvertent defect consistent with the commentary. It would also preclude any revision proceedings after completion of appellate action. This is intended to clarify the rule now in effect in the Army and Air Force.

Article 63 (a) is amended to read as follows:

"(a) If the convening authority or confirming authority disapproves a sentence or when any sentence is vacated by action of the board of review or Judicial Council and the Judge Advocate General, or by the Military Court of Appeals, the disapproving or vacating authority may, except where there is lack of sufficient evidence in the record to support the findings, order or authorize a rehearing, in which case such authority shall state the reasons for disapproval or vacation."

Recommended amendments are made to be consistent with proposed amendments to articles 66, 68, and 70.

Article 66 is amended as follows:

"ART. 66. Appellate review in the Office of The Judge Advocate General.

"(a) Board of review; Judicial Council: The Judge Advocate General shall constitute, in his office, a board of review composed of not less than three judge advocates or law specialists. He shall also constitute, in his office, a Judicial Council composed of three general or flag officers who are judge advocates or law specialists: *Provided*, That The Judge Advocate General may, under exigent circumstances, detail as members of the Judicial Council, for periods not in excess of sixty days, judge advocates or law specialists or grades below that of general or flag officers.

"(b) Additional boards of review and judicial councils: Whenever necessary, The Judge Advocate General may constitute two or more boards of review and judicial councils in his office, with equal powers and duties, composed as provided in the first paragraph of this article.

"(c) Action by board of review when approval by President or confirming action is required: Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the board of review which shall take action as follows:

"(1) In any case requiring action by the President, the board of review shall submit its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to The Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's and Council's opinions, with his recommendations, directly to the Secretary of the department for the action of the President: *Provided*, That the Judicial Council, with the concurrence of The Judge Advocate General, shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the board of review by subparagraph (3) of this paragraph.

"(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of The Judge Advocate General, when the board of review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

"(3) When the board of review is of the opinion that the record of trial in any case requiring confirming action by the President or confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holdings to The Judge Advocate General and when The Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and record shall be transmitted by The Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.

"(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the board of review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and The Judge Advocate General shall not concur in the holding of the board of review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under article 70.

"(d) Action by board of review in cases involving dishonorable or bad-conduct discharges or confinement for one year or more: No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement for one year or more unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by general court-martial involving a sentence to confinement for one year or more, other than records of trial examination of which is required by paragraph (d) of this article, shall be examined by the board of review which shall take action as follows:

"(1) In any case in which the board of review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by The Judge Advocate General or the board of review deemed

necessary, The Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.

"(2) In any case in which the board of review holds the record of trial legally sufficient to support the findings of guilty and sentence, but modification of the findings of guilty or the sentence is by The Judge Advocate General or the board of review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

"(3) In any case in which the board of review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and The Judge Advocate General concurs in such holding, the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted by The Judge Advocate General to the convening authority for rehearing or such other action as may be appropriate.

"(4) In any case in which the board of review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and The Judge Advocate General shall not concur in the holding of the board of review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

"(e) Appellate action in other cases: Every record of trial by general court-martial the appellate review of which is not otherwise provided for by this article shall be examined in the Office of The Judge Advocate General and if found legally insufficient to support the findings of guilty and sentence, in whole or in part, shall be transmitted to the board of review for appropriate action in accord with paragraph (d) of this article.

"(f) Weighing evidence: In the appellate review of records of trials by courts-martial as provided in these articles The Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact."

See note under article 68.

Article 67 is amended to read as follows:

"ART. 67. Branch offices

"Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General who shall be a general or flag officer who is a judge advocate or law specialist, with any distant command, and to establish in such branch office one or more boards of review and judicial councils composed as provided in article 66. Such Assistant Judge Advocate General and such board of review and judicial council shall be empowered to perform for that command under the general supervision of The Judge Advocate General, the duties which The Judge Advocate General and the board of review and judicial council in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President: *Provided*, That the power of mitigation and remission shall not be exercised by such Assistant Judge Advocate General, but any case in which such action is deemed desirable shall be forwarded to The Judge Advocate General with appropriate recommendations."

Article 68 is amended as follows:

"ART. 68. Military Court of Appeals.

"(a) There is hereby established in the National Miiltary Establishment a Military Court of Appeals which shall consist of The Judge Advocate General of the armed services.

"(b) In any case transmitted to them for action pursuant to article 66 or article 70, in which an issue of uniformity of interpretation or construction of the code may arise, the President, the Secretary of a department, or The Judge Advocate General are authorized to certify the record of trial to the Military Court of Appeals for action pursuant to this article, prior to taking action thereon pursuant to article 70 or article 66, respectively.

"(c) Under such rules of procedure as it shall prescribe the Military Court of Appeals shall review the records in any case certified to it pursuant to section (b) of this article.

"(d) In any case reviewed by it, the Military Court of Appeals shall act only with respect to the findings and sentence as approved by the convening authority and only with respect to the issues raised by the authority who has certified the record to it. It shall take action only with respect to matters of law.

"(e) When the Military Court of Appeals is of the opinion that a record of trial is legally sufficient to support the findings of guilty in whole or in part, it shall transmit its opinion in writing to the authority who has certified the record to it for completion of action pursuant to article 66 or article 70.

"(f) When the Military Court of Appeals is of the opinion that a record of trial is legally insufficient to support the findings of guilty and the sentence in whole or in part, such findings of guilty and such sentence or such part of a sentence shall thereby be vacated. If the Military Court of Appeals sets aside the entire sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings of guilty, authorize a rehearing. Otherwise it shall order that the charges be dismissed. If the court has authorized a rehearing, but the convening authority finds a rehearing impractical, he may dismiss the charges."

My objections to articles 66 and 67 (H. R. 4080) are stated in my prepared statement. The amendment I have proposed would preserve to each service an appellate system similar to that now in effect in the Army and the Air Force. In the interest of uniformity a Military Court of Appeals consisting of the Judge Advocate Generals is created. The President, the Secretary of a Department, or the Judge Advocate General are authorized to certify any case referred to them for confirming or appellate action to the Military Court of Appeals if a problem of uniformity of interpretation shall arise. It is contemplated that each service will supply the others with information copies of its holdings and opinions. The court will have jurisdiction to consider matters of law only. It will have final authority to disapprove findings or sentences or any part thereof. If it holds any finding or sentence legally sufficient it shall return the record to the authority certifying the case to it for completion of confirming or appellate action.

It is to be noted that one of the members of the court, the general counsel of the Treasury, will be a civilian.

Article 69 is amended to read as follows:

"ART. 69. Advisory Council on Military Justice.

"There is hereby established in the National Military Establishment an Advisory Council on Military Justice which shall consist of not more than five members who shall be appointed from civilian life by the Secretary of Defense. No person shall be eligible for appointment to the Advisory Council on Military Justice who is not a member of the bar of a Federal court or of the highest court of a State. The Council and The Judge Advocates General of the armed forces shall meet at least twice annually to make a comprehensive survey of the operation of the code and to report to the Committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense and the Secretaries of the departments the number and status of pending cases and any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate."

The above-proposed amendment will provide for a continuing study on the administration of military justice by a body of eminent jurists in conjunction with the Judge Advocates General.

Article 70 is amended to read as follows:

"ART. 70. Confirmation.

"In addition to the approval required by article 64 and subject to the provisions of article 68, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:

"(a) By the President with respect to any sentence—

"(1) of death; or

"(2) involving a general or flag officer: *Provided*, That when the President has already acted as approving authority, no additional confirmation by him is necessary;

"(b) By the Secretary of a department with respect to any sentence not requiring approval or confirmation by the President, when The Judge Advocate General does not concur in the action of the Judicial Council;

"(c) By the Judicial Council, with the concurrence of The Judge Advocate General, with respect to any sentence—

"(1) when the confirming action of the Judicial Council is not unanimous, or when by direction of the Judge Advocate General his participation in the confirming action is required; or

"(2) involving imprisonment for life; or

"(3) involving the dismissal of an officer other than a general or flag officer; or

"(4) involving the dismissal or suspension of a cadet;

"(d) By the Judicial Council with respect to any sentence in a case transmitted to the Judicial Council under the provisions of article 66 for confirming action."

The proposed amendments to articles 70 and 71 are reenactments of articles of war 48 and 49 subject to the powers of the Military Court of Appeals.

Article 71 is amended to read as follows:

"ART. 71. Powers incident to power to confirm.

"The power to confirm the sentence of a court-martial shall be held to include:

"(a) The power to approve, confirm, or disapprove a finding of guilty, and to approve or confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense.

"(b) The power to confirm, disapprove, vacate, commute, or reduce to legal limits the whole or any part of the sentence.

"(c) The power to restore all rights, privileges, and property affected by any finding or sentence disapproved or vacated.

"(d) The power to order the sentence to be carried into execution.

"(e) The power to remand the case for a rehearing under the provisions of article 64."

Article 73 is amended to read as follows:

"ART. 73. Petition for a new trial.

"At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more, the accused may petition The Judge Advocate General for a new trial on grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before the board of review, the Judicial Council or before the Military Court of Appeals, The Judge Advocate General shall refer the petition to the board, council, or court, respectively, for action. Otherwise The Judge Advocate General shall act upon the petition."

"Proposed amendments are recommended for consistency with proposed amendments to articles 66 and 68.

The introductory clause of article 91 is amended to read as follows:

"Any warrant officer or enlisted person who, being inferior in grade, * * *

The addition of the words "being inferior in grade" is intended to make the article consistent with its title, "Insubordinate conduct toward noncommissioned officer."

Without the proposed amendment it would be possible to construe the article as follows:

"Any warrant officer * * * who * * * willfully disobeys the lawful order of a * * * noncommissioned officer * * *; or treats with contempt or is disrespectful in language or department towards * * * noncommissioned officer * * * while such officer is in the execution of his office shall be punished as a court-martial may direct."

It is not believed that the committee intended to punish under this article a warrant officer for disrespect to a corporal.

Article 97 is amended to read as follows:

"ART. 97. Unlawful detention of another.

"Any person subject to this code who, willfully and without authority of law, apprehends, arrests, or confines any person shall be punished as a court-martial may direct."

The proposed amendment inserts the word "willfully" as describing the offense denounced. It is believed that the amendment will prevent prosecution for merely technical violations of the code pertaining to apprehension, arrest, or confinement. It will require that the act be done with unlawful intent.

Article 98 is amended to read as follows:

"Any person subject to the code who knowingly and intentionally fails to enforce or comply with any of the provisions of articles 30 through 34 and article 37 shall be punished as a court-martial may direct."

The amendment is calculated to put teeth into the requirement of the code for prompt and proper disposition of cases and for the provision forbidding the unlawful influence of courts without destroying the freedom of exercise of their

judicial functions of the courts, counsel, and reviewing authorities. I am afraid that, as written, article 98 would make it possible to punish any member of a court or counsel for the slightest procedural error. It might authorize commanders who are forbidden to censure, reprimand, or admonish courts to prefer charges against its members of personnel for such errors as the improper admission or exclusion of evidence, improved action on a challenge, or for finding an accused guilty of an offense not necessarily included in that charged.

Article 99 is amended to read as follows:

"ART. 99. Misbehavior before the enemy.

"Any member of the armed forces who before or in the presence of the enemy—

"(1) misbehaves himself; or

"(2) runs away; or

"(3) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend; or

"(4) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property; or

"(5) casts away his arms or ammunition; or

"(6) is guilty of cowardly conduct; or

"(7) quits his place of duty to plunder or pillage; or

"(8) causes false alarms in any command, unit, or place under control of the armed forces; or

"(9) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or

"(10) does not afford all practicable relief and assistance, consistent with his duty and mission, to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle;

shall be punished by death or such other punishment as a court-martial may direct."

The foregoing amendment adds the general provision contained in article of war 75, "who * * * misbehaves himself" (1). This term has long been construed as making culpable under the article any conduct by an officer or a soldier not conformable to the standard of behaviors before the enemy set by the custom of our arms. It has been used to punish flagrant misconduct before the enemy not specifically denounced elsewhere in the same article. In view of its long-established construction I recommend its retention in the code.

Section (10) has been amended to make it clear that it is not intended to compel a soldier or commander to abandon a mission of paramount importance in order to render relief to troops, etc., who may be in distress. For example, it is standard instruction to infantrymen that they must continue to advance during an attack without stopping to render aid to the wounded. Such functions are left to medical-aid men.

Article 118. Murder:

"Any person subject to this code who unlawfully kills a human being with malice aforethought is guilty of murder and shall suffer such punishment as a court-martial may direct, except that if found guilty of premeditated murder he shall suffer death or imprisonment for life as a court-martial may direct."

An attempt was apparently made in article 118 as drawn by the Morgan Committee to define and particularize "malice aforethought." It is believed that the attempted definition is too restrictive and does not cover all the circumstances which might give rise to malice aforethought; for example, homicide committed in the perpetration of a burglary is said to be murder while no mention is made of murder committed in the perpetration of a housebreaking. This distinction is somewhat difficult to understand. The proposed amendment is taken from title 28 United Stats Code, section 1111.

Article 119. Manslaughter:

"(a) Any person subject to this code who unlawfully kills a human being in the commission of an intentional act inherently dangerous to life, done in the heat of sudden passion brought about by adequate provocation, is guilty of voluntary manslaughter and shall be punished as a court-martial may direct.

"(b) Any person subject to this code who unintentionally kills a human being in the commission of a culpably negligent act or in the commission of an act wrongful in itself but not inherently dangerous to life is guilty of involuntary manslaughter and shall be punished as a court-martial may direct."

As to voluntary manslaughter, the proposed amendment to article 119 does away with the necessity for definition of the phrases "intent to kill" appearing in the article as presently drawn. It will be noticed that the proposed definition

of voluntary manslaughter follows that set forth in paragraph 180 (a). Manual of Courts Martial 1949. Voluntary manslaughter is homicide which would be murder were not the malice aforethought ordinarily implied from the doing of an act likely to result in death excusable because of adequate provocation (*Commonwealth* v. *Webster*, 5 Cush. (Mass.) 295).

The proposed definition of involuntary manslaughter has also been taken from paragraph 180 (a), Manual of Courts Martial 1949 and is considered to be a most modern and complete definition of that crime. See *Lee* v. *United States* (112 F. 2d 46, and 40 C. J. S., p. 868, and cases there cited) to the effect that homicide unintentionally committed in the perpetration of an act not inherently dangerous to life, though the act be a felony, is not murder but at most involuntary manslaughter. The act must, of course, be wrongful in itself (malum in se). It is thought that the requirement in the article as presently written that the act be one "directly affecting the person" is misleading and perhaps too restrictive.

Article 121. Larceny and wrongful appropriation:

"Any person subject to this code who, knowingly and with intent to deprive the true owner permanently of his proprietory interest, wrongfully appropriates personal property to the use of a person other than the true owner without such owner's consent, or with his consent obtained by false pretense, steals such property and is guilty of larceny, and shall be punished as a court-martial may direct; but if the appropriation is committed with intent to deprive the true owner only temporarily of his proprietory interest, he is guilty of wrongful appropriation and shall be punished as a court-martial may direct.

"Whether the property initially came lawfully or unlawfully into the hands of the person appropriating it shall be immaterial with respect to these offenses."

The prompt amendment to the definition of larceny is an extension of the definition of that crime in paragraph 180 (a), Manual for Courts Martial, 1949 (covering the common-law offenses of larceny and embezzlement). It includes all forms of theft; larceny, embezzlement, obtaining by false pretense, and knowingly receiving stolen property. The word "appropriate" is well known to the military and has often been defined to comprehend various forms of wrongful use of the property of another without regard to whether the property initially came lawfully or unlawfully into the hands of the person appropriating it (A. W. 94, A. G. N. 14). The proposed definition is intended to cure the following defects in article 121 in its present form:

(1) Article 121 as presently written tends to be somewhat verbose, using many words which, in the final analysis, are intended to achieve the same result. For example, a distinction without too much real difference appears to be drawn between taking, obtaining, and withholding which might well lead to confusion in drawing specifications and in defining the crime in the manual. It will be noted that the proposed definition does not concern itself with the question as to how the accused acquired the property. It is sufficient if he wrongfully appropriated it (wrongfully applied it to the use of one other than the true owner) with the requisite intent.

(2) The article as it now reads makes no distinction between a permanent and a merely temporary deprivation. It is thought to be unfair and unjust, indeed even damaging to morale, to place the odium of having committed "larceny" upon one who merely uses another's property temporarily. This is deemed to be so even though the punishment in the table of maximum punishments is different with respect to intent.

(3) The article as now written makes any type property the subject of larceny. Thus a disseisin or a fraudulently obtained tenancy would be larceny. There seems to be little point in the military becoming involved in questions of the law of real property. In this connection, the proposed definition would cover property severed from the realty by the thief, for the reason that once the property is severed it becomes personal property and when it is then moved or otherwise is made the subject of a wrongful exercise of dominion, it is "appropriated."

Article 122. Robbery:

"Any person subject to this code who, with intent to steal, wrongfully takes personal property from the person or in the present of another, against his will, by violence or intimidation, is guilty of robbery and shall be punished as a court-martial may direct."

Article 122 as presently written states that "fear of immediate or future injury to his person or property or the person or property of a relative or member of his family" is sufficient to constitute robbery. This might be true if the threatened

injury to the victim's property or that of a "relative" or member of his family is of sufficient gravity to warrant giving up the property demanded by the assailant. It is certainly not true in every case (see Russell, Law of Crimes, seventh edition, p. 1138) and, in any event, matter such as this is more properly covered in explanations of the element of apprehension in the manual. The proposed amendment omits the unnecessary, and perhaps dangerous, part of the definition of robbery.

Article 123. Forgery:

"Any person subject to this code who, with intent to defraud or injure another—

"(1) falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another; or

"(2) passes, utters, offers, issues, or transfers such a writing as true and genuine, knowing it to be so made or altered,

is guilty of forgery and shall be punished as a court-martial may direct."

The definition of this crime as presently set forth in article 123 is much too narrow insofar as it states that the instrument "would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice." There is no reason for requiring that the instrument might operate to the legal, as distinguished from other, prejudice of another. False instruments which tend to impair or impede a governmental function have been held to be subjects of forgery (*Head* v. *Hunter*, 141, F. 2d 449, 451). The proposed definition is taken from section 22–1401 of the Code of the District of Columbia.

Article 125. Assault:

"(a) Any person subject to this code who, with unlawful force or violence, attempts to do bodily harm to another or puts another in reasonable fear of immediate bodily harm is guilty of assault and shall be punished as a court-martial may direct.

"(b) Any person subject to this code who commits an assault with a dangerous weapon or other instrument or force likely to produce great bodily harm, or commits an assault with specific intent to do great bodily harm, is guilty of aggravated assault and shall be punished as a court-martial may direct.

"(c) Any person subject to this code who commits an assault with intent to commit any felony is guilty of felonious assault and shall be punished as a court-martial may direct."

The proposed definition of assault is taken from paragraph 180 (k), Manual for Courts Martial, 1949.

Article 125 (b) of the present draft restricts assault with intent to do bodily harm (not with a dangerous weapon) to cases where bodily harm is actually committed. There seems to be no warrant for this restriction and the proposed amendment follows title 18, United States Code, section 113 (c).

The proposed amendment adds felonious assaults (assaults with intent to commit any felony). Such assaults are denounced in title 18, United States Code, section 113 (a) and (b). The Morgan report states that such assaults were intentionally omitted from the code because they were actually attempts. This is thought not to be the law, for a person can assault another (for example, a watchman) with intent to commit a felony (for example, a housebreaking) without having gone far enough with respect to the intended felony to constitute an attempt to commit it.

Article 126. Arson:

"Any person subject to this code who willfully and maliciously sets fire to or burns any building or structure, movable or immovable, is guilty of simple arson and shall be punished as a court-martial may direct; but if the building is a dwelling or if the life of any person in the building or structure is put in jeopardy, he is guilty of aggravated arson and shall be punished as a court-martial may direct."

The proposed amendment to article 126 deletes so much of the definition of arson as indicates that this crime may be committed by burning any kind of property. The definition suggested herein follows to a certain extent that contained in title 18, United States Code, section 81.

Art. 127. Extortion.

"Any person subject to this code who, verbally or in writing, threatens to accuse another of a crime or offense or threatens an injury to the person or property of another, with intent thereby to obtain anything of value or to compel any person to do an act against his will, is guilty of extortion and shall be punished as a court martial may direct."

The definition of extortion as presently written in article 127 does not set forth the type threats which the law considers of a sufficiently grave nature to warrant

a conviction of extortion, and does not mention intent to make a person do an act against his will, which is generally considered to be a sufficient intent. (See sec. 22-2305, District of Columbia Code; Massachusetts General Laws, ch. 265, sec. 25.)

Article 140 is amended to read as follows:

ART. 140. Delegation by the President.

"The President is authorized to delegate any nonjudicial authority vested in him under this code and to provide for the subdelegation of any such authority."

In explaining to the Committee on Armed Services of the House of Representatives the intention of the draftsmen with respect to the article, Mr. Larkin stated:

"I think, despite the authorization the President cannot delegate judicial acts, perhaps even legislative acts. So it is effective only to the extent that it is an administrative act.

"I think they have to be studied on a case-by-case basis as they come up.

"But it was the desire of the Bureau of the Budget to provide an appropriate flexibility in the future if it appears that it is desirable for the President to delegate some of his duties under the code" (hearings on H. R. 2498, p. 1260).

It is to be noted that in *Runkle* v. *United States*, (122 U. S. 543), the Supreme Court held that the President could not legally delegate a judicial function which requires his personal judgment unless such delegation is authorized by statute. Since article 140 (H. R. 4080) does provide for such delegation, and since, according to the spokesmen for the committee, this was not intended, I propose the above amendment to cure the defect.

Senator KEFAUVER. I did have one or two questions here. It is stated here that you will need about 1,100 additional laws for the Army legal corps if this bill is enacted into law. Was that your calculation?

General GREEN. No. Certainly not additional. That is not right; I am sure of that.

Senator KEFAUVER. It says at page 1174:

The Department of the Army now has on duty 793 officers who can qualify as law officers and trial counsel. They estimate they would need a total number of 1,100 officers to satisfy the requirements of articles 26 and 27.

General GREEN. That would be about 300 more than we now have. It is anybody's guess.

One of the provisions that will take a lot of men would be to have lawyers prosecuting and defending in every single case. That would run up the number quite a bit.

Senator KEFAUVER. Mr. Wiener said the other day that lawyers were very hard to procure at the present time. I always thought that lawyers were a dime a dozen when I practiced.

General GREEN. No; they are not. Good ones are very hard to get. I am satisfied with our program, however.

Senator KEFAUVER. Do you think you could procure the additional lawyers necessary?

General GREEN. It would take some time, but we have done fairly well so far.

Senator KEFAUVER. It is required in some section of this bill that judge advocate general officers on your staff be graduated from law schools; and I think that they should be members of the bar. Is that required?

General GREEN. And members of the bar?

Senator KEFAUVER. And members of the bar.

General GREEN. I am heartily in favor of that. I have about 585 officers of which 3 are not members of the bar. Two of them are doing their best to get admitted.

Senator KEFAUVER. Of course the matter of military justice is only a part of the service to which you put your lawyers?

General GREEN. That is correct. I would say about 35 percent of our business at present.

Senator KEFAUVER. I believe that is all. Thank you very much, General Green.

## STATEMENT OF REAR ADM. GEORGE L. RUSSELL, JUDGE ADVOCATE GENERAL OF THE NAVY

Senator KEFAUVER. Rear Adm. George L. Russell, Judge Advocate General of the Navy, is present and I want the record to show that Admiral Russell did not ask to testify, that he was requested to do so by the committee because we wanted his views. We appreciate your appearance here today, Admiral Russell.

Whenever your testimony is different from that of anyone else who has testified on behalf of the Navy or on the committee from the Navy, we would appreciate it if you would so designate it—I mean when you speak personally from your own viewpoint.

Admiral RUSSELL. It so happens, Mr. Chairman, that my viewpoint and the Navy's viewpoint are the same. I am authorized to speak for the Navy and the Navy Department. I have a few comments which are my own but they are not inconsistent with the provisions of the bill.

Senator KEFAUVER. All right, sir.

Admiral RUSSELL. I have no prepared statement but with your permission I will proceed.

Senator KEFAUVER. Go right ahead. You know the points in controversy and we would be glad to have your statement about any matter in the bill.

Admiral RUSSELL. I should like to say first that I believe I appear here as an operator and it is up to me to make this legislation work. I realize that there has been a great deal of testimony given and I have no doubt it is very sincere. It is nevertheless true that a great many of the advocates of this, that, and the other do not have the responsibility of making a Uniform Code of Justice a workable statute, and throughout the preliminary work in the drafting of the measure I was given every opportunity, point by point, over a period of about 8 months, when the working group submitted its work to the ad hoc committee headed by the Secretary of Defense, and I find that I am in agreement with the bill as introduced, which is the way we transmitted it from the Secretary of Defense.

I would like to say, however, by way of comment: I had some misgivings about the adequacy of the sentence review as provided in this bill. My concern was that there might not be as good a review as a court-martial case now gets in my office.

At the present time, the Judge Advocate General has nothing to do with the sentence. That is a matter for either the Bureau of Naval Personnel or the Commandant of the Marine Corps, who in turn recommends to the Secretary of the Navy, via what we call a sentence review and clemency board.

Under the terms of the bill the sentence determination, or at least the initial determination, would be made by the board of review appointed by the Judge Advocate General. Presumably that would be

three officers. It might be more, maybe, but there is no provision in the bill for anybody to look over these fellows' shoulders a little bit.

For that reason I pointed this out to the House committee, and in an effort to remedy what perhaps they took my word for was a defect, they have written into section 74–A the authority for the Secretary of the Department concerned to designate the Judge Advocate General and empower him to act on the sentence.

I differentiate between clemency as exercised by the so-called clemency board and the determination of what is the proper sentence upon the initial review. Do I make myself clear there, sir?

Senator KEFAUVER. Fairly, I think. Will you examine 74–A? What is the particular part of it that you refer to?

Admiral RUSSELL. As the bill passed the House, Mr. Chairman, there was written in there the authority for the Secretary of the Department to designate, among others, the Judge Advocate General to act on the sentence, on the first go-around. That was not in the bill as introduced. I think that is a good thing because otherwise I could conceive of all kinds of situations in which this board of review might go wrong.

Senator KEFAUVER. It seems to me that you have too many people designated with the right to remit or suspend any part of the sentence.

Admiral RUSSELL. I would not expect that all three of them would be acting, however. I would think the Secretary of the department would designate one of them to do it.

Senator KEFAUVER. Might he not designate one in one instance and another in another instance?

Admiral RUSSELL. Yes, sir. He could under this language.

Senator KEFAUVER. What does that do for your uniformity of procedure and practice?

Admiral RUSSELL. It does not hurt it any. Along with this same point was the question of the legal review given a case in my office, and I can think of some pretty close cases there. It is true I would have authority to certify them to what is now called the court of military appeals, and I do not have any quarrel with that.

I am satisfied that the legal review will be adequate, but I am concerned about the sentence review. I am also a little bit—I do not like to say "concerned"—but I do express the hope that this full statute will work all right in time of war. We do not know. We will have to take a chance on that.

With a tremendously expanded Navy, I can see a possibility that we might have to shake off a bit here and there in order to get the cases tried. I hope it will work all right, sir.

Another point is the effective date. As now written, it is to become effective 1 year after date of approval. There again it may work but it might not. During the period from the time of approval until this act becomes effective we will have to do two big things, as I see it.

One of them is to write a manual, which I have no doubt can be accomplished. The other is to increase the number of lawyers. I do not know whether we can get the additional lawyers in that time or not. I think it would be most unfortunate——

Senator KEFAUVER. How many lawyers do you have in the Navy?

Admiral RUSSELL. We figure we need 287 additional lawyers and it just so happens that the Under Secretary of Defense, Mr. Early, has assigned a letter of transmittal to the chairman of this committee this morning—I brought it along with me—recommending the enactment of enabling legislation. I just gave it to Mr. Galusha.

Senator KEFAUVER. In this letter of May 4 to the chairman, Senator Tydings, he recommends the introduction of a bill so as to enable the Navy to procure approximately 287 law specialists in addition to those presently authorized.

Admiral RUSSELL. Yes, sir, that is correct.

Senator KEFAUVER. I am going to have to go down and let them know that I am still present in the Senate. Would you gentlemen mind if we recessed about 2 minutes?

(Whereupon a short recess was taken.)

Senator KEFAUVER. All right, Admiral Russell.

Admiral RUSSELL. I had just about completed my comments on the bill as introduced. I might add one more, namely, that it is a fact that every time anybody thinks of a court martial he immediately thinks of the Judge Advocate General. I do feel that if I am going to be considered responsible for the law and the sentence, that the Judge Advocate General ought to have some authority.

As the bill now reads it is lodged entirely in the board of review in the Office of the Judge Advocate General. So much for the bill as it was introduced. In the House there were two amendments adopted and passed, to which I should like to address myself now.

The first of those is section 12 of article 140, which would require the Judge Advocate General to go over all the courts martial in World War II and upon good cause shown, review them. In my opinion that is not necessary in the Navy Department for a variety of reasons. There was a board especially convened to do this very thing, headed by a Professor Keefe.

Mr. Larkin was a member of that board. They reviewed a tremendous number of them—something over 2,000—and they made recommendations in about half of them. In addition, the Congress established what is known as a board of discharges and dismissals for the correction of naval records. Both of those boards have been going concerns and have been operating daily for a number of years.

There is also a clemency board in continuous session in the Navy Department, before which board the clemency matters are considered periodically, and, on top of it all, I do not have the personnel to do this now. This is section 12 I am talking about. The other section which was added as an amendment in the House is section 13.

Senator KEFAUVER. While we are on section 12, in the Navy, how many offenses are there that were committed during World War II on which review would be necessary under section 12?

Admiral RUSSELL. I have no way of estimating that. Perhaps Mr. Larkin can tell you.

Senator KEFAUVER. Do you know, Mr. Larkin?

Mr. LARKIN. I do not, offhand, but I do have some statistics, Senator, that I could furnish the committee. It is in the thousands. It runs probably over 25,000 cases in which a petition of this character could be made to the Navy. The Army's was much more.

General GREEN. One hundred and twenty thousand.

Mr. LARKIN. One hundred and twenty thousand.

General GREEN. We are functioning on this right now.

Senator KEFAUVER. You are functioning under this requirement now?

General GREEN. It is similar.

Mr. LARKIN. This was taken from Article of War 53, which was amended in the Elston bill last time for the Army and Air Force only, and, as you say, you are functioning under it, I guess, since February 1.

General GREEN. Yes; that is right. Under the Elston provision.

Senator KEFAUVER. General Green, is it an onerous requirement, insofar as the Army is concerned?

General GREEN. Yes, sir.

Senator KEFAUVER. How far along have you gotten? What percentage of them have you finished?

General GREEN. Not very many. About 40. It is only 2 months. We are functioning every day. We are having rehearings, new trials, and so forth, right now. That provision does not apply to the Navy.

Senator KEFAUVER. Very well, Admiral Russell.

Admiral RUSSELL. Section 13, which represents the House amendment, is the outcome of a proposal that the Navy lawyers be organized in a corps. We think we have an organization which is better than a corps in the Navy, although we have not had it very long.

It appears to us thus far to embody the advantages of a corps and leave out the disadvantages. We call our Navy lawyers Navy law specialists. The basic idea, I think, of the proponents of the corps was the separation of command and discipline, and on the House side that was voted down, but the idea of a corps seemed to linger on, and this section 13 has four requirements as to who may be Judge Advocate General after I leave the job, and as written it reduces the field to zero.

There is no one who can quality. I hope that was inadvertent but it is nevertheless true.

Senator KEFAUVER. Maybe that is an effort toward unification.

Admiral RUSSELL. In other words, I think the thing is entirely too restrictive.

Senator KEFAUVER. It provides that they "shall be members of the bar of the Federal court or the highest court of the State."

Admiral RUSSELL. We do not object to that.

Senator KEFAUVER. "Shall be judge advocates or law specialists." You do not object that that?

Admiral RUSSELL. No, sir. We have about half a dozen officers, Mr. Chairman, who are not law specialists but who are nevertheless working at the law, of whom I happen to be one of them. Actaully I think I am the only one who could meet these requirements now but for the law specialist requirement. I am a member of the District of Columbia bar and I meet the 8- and 3-year requirements both.

Senator KEFAUVER. "Shall have at least 8 years cumulative experience in a Judge Advocate's Corps."

Admiral RUSSELL. Another thing about that language, they say "In a Judge Advocate's Corps." I do not think it is right to bar, for example, the officer who is a district legal officer in Honolulu or San Francisco, or anywhere else. He is a full-time law man, and the requirement that he has to be on duty in my office is a mistake, I think. I hope it was unintentional.

Senator KEFAUVER. And the last 3 years of which prior to the appointment should be consecutive. That is the most restrictive of all, is it not?

Admiral RUSSELL. Yes, sir. That automatically eliminates practically all of the nonspeciailists, of whom, as I say, there are only six or seven, but it rules them out. I have the feeling that the Secretary of the Navy ought to have a little freedom as to whom he wants to be the Judge Advocate General, and this, as Mr. Vinson remarked, is practically legislating one officer who will be eligible in August of this year, I think, into the office.

Senator KEFAUVER. Anything else, Admiral Russell?

Admiral RUSSELL. Yes, sir. If I could take the time of the committee long enough to tell you what we have in the way of lawyers and what their qualifications are, it might be helpful. We have 240 law specialists which were authorized by the Office of Personnel Act of 1947. This is comparatively new.

He is a new animal to the Navy. We have had only these 2 years' and a little bit experience with it but it has been working very well and it represents an economy of personnel which I think is important. In addition to those 240 specialists—incidentally, 95 percent of them are members of the bar somewhere, and the other 5 percent are graduates of accredited law schools. In addition to those 240, we have 30 Reserve officers who have been retained on active duty, all of whom are qualified lawyers.

I have 12 civilian attorneys in my office. Of the remainder there are now seven unrestricted line officers working at the law. There are three in my office and there are four in the field. That comprises our sum total.

Under the terms of this bill we have computed, as nearly as possible, what our lawyer requirements will be and we have come up with the figure of 287 more. I think it is going to be difficult to get them, particularly as the Army needs them and the Air Force needs them, and as I said a moment ago, maybe they are a dime a dozen, but good ones are not.

I think that completes my statement, if Your Honor please.

Senator KEFAUVER. Senator Morse?

Senator MORSE. I have no questions. I have one suggestion, that if you gentlemen in the Navy could give us a comparative analysis of this bill, along with specific suggestions for its improvement, from the Navy standpoint, I think it would be very helpful to the committee, and as long as it is put on the basis of a request on our part rather than a voluntary offering on your part, I do not see why the Navy should have any objections to it.

Admiral RUSSELL. The Navy does not have, sir. I have a list of amendments. I did not want to take up the time of the hearing to present them.

Senator MORSE. My suggestion is that you file those with us as the suggestions that the Navy makes after an analysis of this bill from the standpoint of how you think the bill could be improved.

Admiral RUSSELL. I would be glad to, sir. I might say they will not be inconsistent with the bill as it now stands. I believe they will be in the nature of what I hope are improvements.

Senator KEFAUVER. Will you file those with the reporter, Admiral?

(The matter referred to is as follows:)

NAVY DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
*Washington, D. C.*

MEMORANDUM

For: Senator Kefauver.
(Attention: Colonel Galusha.)

Subject: H. R. 4080 (Rept. No. 491), Uniform Code of Military Justice.

In response to your invitation to the Judge Advocates General of the Army, Navy, and Air Force to submit clarifying amendments and suggestions, the following are offered:

Article 15 (a) (2) (E), page 15, line 22, delete the following: "if imposed upon a person attached to or embarked in a vessel".

Article 15 (a) (2) (F), page 15, line 25, delete the following: "if imposed upon a person attached to or embarked in a vessel".

*Explanation.*—The above suggested changes restore these sections to their original form as drafted and approved by the Morgan committee. Since the Army and the Air Force have not used these two punishments and do not desire to use them, the committee, rather than deprive the naval service of punishments which were considered necessary in the administration of discipline, provided for them in the code but allowed each service to decide whether or not it would use them by making it discretionary with the Secretaries of the various services as to whether or not they would be considered authorized commanding officer punishments. At this point it is felt necessary to invite attention to the fact that the Navy and the Marine Corps do not resort to so-called company punishment. Commanding officers in the Navy are generally more experienced and mature persons, corresponding in the Army to regiment or post commanders. To limit these mature and experienced officers to the punishments permitted by article 15, H. R. 4080, would seriously curtail the ability of these officers to correct difficult or incorrigible persons without resort to court-martial proceedings in a number disproportionate to the number under present practice, solely because no adequate remedy can be found initially.

In connection with confinement on bread and water, it is desired to point out that experience has demonstrated this to be the most effective punishment which can be inflicted on habitual and recalcitrant individuals who do not respond to other disciplinary measures. Particularly is this true in prisons, disciplinary barracks, and other places of confinement, since as a practical matter this is the only nonjudicial punishment for minor offenses which has any effect upon men already in confinement. Failure to authorize this punishment for men in confinement will result in such men being tried even for minor offenses by courts martial, acts which would unnecessarily damage the men's records and opportunities for restoration to duty or for separation under honorable conditions. It is urged that where the administration of commanding officer's punishments is in the hands of experienced and mature persons, as is generally the case in the Navy, the enlisted man in his career will fare much better when that commanding officer is able to correct him through summary action rather than through courts-martial proceedings.

Article 22 (a) (3), page 21, line 5, between the words "Army" and semicolon insert "or Marine Corps."

Article 22 (a) (5), page 21, line 12, between the word "Force" and semicolon insert "or Marine Corps."

Article 23 (a) (5), page 22, line 9, delete "or of any marine brigade, regiment, or barracks" and substitute in lieu thereof the following: "the commanding officer of any marine brigade, regiment, battalion, or corresponding unit; the commanding officer of any marine barracks, wing, group, separate squadron, station, base, auxiliary air field, or other place where members of the Marine Corps are on duty."

Article 27 (b) (1), page 26, line 13, delete entire section and substitute therefor: "shall be a judge advocate of the Army or the Air Force, or a law specialist of the Navy or Coast Guard, or a person who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State."

*Explanation.*—This section as it presently appears in the subject code prevents service as trial or defense counsel by those members of the naval service who are not members of a bar but are graduates of an accredited law school. In addition,

its application to the Marine Corps which has no law specialists but does have considerable numbers of Regular officers who are graduates of accredited law schools, some of whom have taken the bar examination but many of whom have not, would seriously limit the members of that service competent to act as trial or defense counsel.

Article 45 (b), page 40, line 1, between words "to" and "an" insert the following: "Any charge or specification alleging."

Article 50 (a), page 44, line 10, delete words "issue was" and substitute therefor "acts and events were."

Article 121, page 83, line 16, delete the word "another" and substitute therefor "any other person."

Article 121, page 83, line 18, after "obtains," insert the following: "Uses."

Article 122, page 84, line 2, delete the word "another" and substitute therefor "any other person."

Article 124, page 84, line 21, delete the words "the person of another" and substitute therefor the words "any other person."

Article 125, page 85, line 9, delete the word "another" and substitute therefor "any other person."

Article 66, page 54. When this bill was being drafted, and the concept of boards of review was advanced, I pointed out the dangers of an inadequate review of a given court-martial case that might result. Accordingly the bill as drafted by the Morgan committee contained a provision which would authorize the Judge Advocate General to return a case to the same or another board of review for reconsideration. I was particularly concerned with the sentence review.

As amended by the House, the language which would provide for a more comprehensive review in the Office of the Judge Advocate General should it be considered advisable in the interests of justice was stricken from the bill, apparently because it was felt that the Judge Advocate General would thus be in a position to "shop around" for an opinion to his liking. In an attempt to offset the elimination of the pertinent language, other language was inserted in section 74 (a) which would permit the Secretary of a Department to authorize the Judge Advocate General (among others) to remit or suspend unexecuted portions of a sentence.

The result of the above is to vest in the board of review the power to make final determination of a sentence upon initial review of the case, leaving to those officers designated by the Secretary of the Navy reserve power to remit or mitigate. I do not consider that result satisfactory, for two reasons:

(*a*) I believe the authority to make final determination of a sentence on initial review, as distinguished from clemency stemming possibly from good behavior during confinement and other similar conditions, should be vested in higher authority than is represented by three individuals in the Office of the Judge Advocate General. In this connection it should be noted that elaborate provisions are made for legal review by higher authority.

(*b*) The Navy Department and the Judge Advocate General in particular are going to be held responsible for the quality of justice throughout the naval service. It by no means follows that justice will invariably be served by reducing the terms of a sentence; consequently I believe some provision should be made for higher authority to review the judgment of the board of review—a power now lodged in the Secretary of the Navy.

While I believe the review processes can be made to work satisfactorily under the terms of the bill as drafted and as introduced in the Senate, the following is suggested as an alternative:

Article 66 (c), page 54, line 22, delete the words "and sentence."

Page 54, line 24, delete the words "and the sentence or such part or amount of the sentence."

Page 55, line 5, after the word "witnesses", change period to colon and add the following: "*Provided*, That the board of review shall recommend to the Secretary of the Department concerned via the Judge Advocate General thereof the remission or suspension of any sentence or any part thereof which it deems excessive."

Article 127, page 86, line 3, delete the word "another" and substitute therefor "any other person."

Article 128, page 86, line 10, delete "another" and substitute therefor "any other."

Article 129, page 86, line 24, delete the word "another" and substitute therefor "any other person."

Article 130, page 87, line 3, delete the word "another" and substitute therefor "any other person."

Article 133, page 89, line 2, before the word "or" add the following: "warrant officer."

Article 133, page 89, line 3, delete the following: "be dismissed from the armed forces" and substitute therefor the following: "be punished as a court-martial may direct."

Article 140, sections 12 and 13. Delete both sections. The review of World War II cases has been provided for and has been completed. The provision relating to the selection of a Judge Advocate General is at present too restrictive insofar as the Navy is concerned since there appears to be at this time no one eligible in accordance with the provisions for appointment as Judge Advocate General.

Respectfully yours,

G. L. RUSSELL,
*Rear Admiral, United States Navy,*
*Judge Advocate General of the Navy.*

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NAVY DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
*Washington 25, D. C., June 3, 1949.*

MEMORANDUM

For: Colonel Galusha.

Subject: Proposed amendment to section 13 of article 140 of H. R. 4080 (Uniform Code of Military Justice).

1. It is recommended that the subject section be amended in order to provide a workable specification as to the personality of the Judge Advocate General of an armed force. The present wording of section 13 cannot be made effective in the Navy at present nor in the foreseeable future; namely, the expiration of the present Judge Advocate General's statutory term.

2. The following rewording is suggested, although it would be better to exclude from a statute establishing a Uniform Code of Military Justice provisions relating to organization, administration, and personnel affecting the entire legal business of a military department.

"SEC. 13. Hereafter, the Judge Advocate General of an armed force, exclusive of the present incumbents and exclusive of the Coast Guard when not operating as a part of the Navy, shall be appointed from among those officers who, at the time of such appointment, are members of the bar of a Federal court or the highest court of a State or Territory and who have had not less than a total of 8 years' experience in legal duties as commissioned officers."

3. As a new subject, section 12 of H. R. 4080 would empower the Judge Advocate General to substitute for a dismissal, dishonorable discharge, or bad-conduct discharge, previously executed a form of discharge authorized for administrative issuance in any court-martial case involving offenses committed during World War II. I assume that this provision was inserted in the bill to parallel a similar provision in the so-called Elston Act which applied to the Army. The Navy not only does not need this provision but it would impose upon the Judge Advocate General an administrative work load which he is not equipped to handle. In the first place the widest latitude has already been given to individuals who desire to appeal the degree of sentences awarded by appearing before two boards established by the Congress, one the Board of Discharges and Dismissals, and the other the Board for the Correction of Naval Records. Additionally, a sentence review board was set up in 1946 to accomplish the purposes contemplated by section 12. That board reviewed something over 2,000 cases and made specific recommendations in about half of them. It shoud also be remembered that the present sentence review and clemency board is in continuous operation and that those individuals who are now confined have their cases reviewed periodically.

Very respectfully,

A. S. MCDILL,
*Captain, United States Navy, Legislative Director.*

Senator KEFAUVER. There are one or two questions I wanted to ask. The law member of the court—it is provided that he does not vote. Do you think he should vote?

Admiral RUSSELL. No, sir; I do not think he should.

Senator KEFAUVER. Why do you think he should not?

Admiral RUSSELL. Because I realize the Army has had office experience but it appears to me if he is going to act in a judicial capacity, which he is, he ought to leave to the other members the fact-finding part of it. Make a jury out of him if you will.

Senator KEFAUVER. In the Navy practice, before the Elston bill, you did not have a law member of the public court?

Admiral RUSSELL. No, sir.

Senator KEFAUVER. You do have now?

Admiral RUSSELL. No, sir. The Elston bill did not apply to the Navy.

Senator KEFAUVER. How about the Court of Military Appeals? Do you think that practical?

Admiral RUSSELL. I would think so; yes, sir. I am in this position, Mr. Chairman: When I sign my name to an opinion now I have to defend it somewhere. It so happens that the Secretary of the Navy is the one to whom I am immediately responsible. There is no such thing as command control over me, wherever else you might find it.

I am beholden to nobody but the Secretary of the Navy. It does not make any difference to me, from a workable standpoint, who reviews what I say is my opinion. I would just as soon it be this Court of Military Appeals as the Secretary of the Navy.

Senator KEFAUVER. You and General Green are in agreement about the board of review having too much authority?

Admiral RUSSELL. I believe we are; yes, sir. We said it in different ways. I am afraid of the sentence part of it.

Senator KEFAUVER. What do you think about one Judge Advocate General for all of the services?

Admiral RUSSELL. I think it could probably be made to work. I do not see any reason for it. I do not believe there is any duplication or wasted effort anywhere. If there is, I have not seen it. We will have just as much work to do regardless of the organization. I do not believe we could save anything by it.

Senator KEFAUVER. The Navy does not want a legal corps?

Admiral RUSSELL. We would prefer not to have it, sir.

Senator KEFAUVER. What is your reason for that?

Admiral RUSSELL. I hope the general will not take my remarks as being a crack at the Army, but we are afraid that if we organize these lawyers into a corps that we will wind up with what we call compartmentation, namely, try and get them to do anything else.

It is all fine for a lawyer to sit in his office and commune with the lawbooks to the exclusion of everything else, but it is not a very economical way to employ him unless that is all he has to do all day long. I can illustrate that in two or three ways.

The one I used in the House was one of the officers at Guantanamo Bay, Cuba. The truth of the matter is: There is not enough law business to keep him busy all day, full time. He handles what there is. As a result he has been given several other duties. He handles five jobs. He is intelligence officer, and the commandant has found him very useful.

I have had another case of an officer who I thought had the wrong idea of what his duties were and he did not like it very well because he got elected treasurer of his mess. That was too much for me. The

idea of a line specialist is also that he can get around and learn something more about the Navy than he could if he just sat still.

I hold to the belief that our Navy lawyers are going to be better according to how much Navy experience they have, and if it involves getting some salt in their whiskers, so much the better. I could think of a great many details of duty that would not hurt any of them.

Captain MacDill and I were talking about that this morning. The shore patrol is not a bad experience in human relations. It would not have to be permanent but I think the more a Navy lawyer knows about it the better.

Senator KEFAUVER. As matters now stand, you give any lawyer in the Navy sea duty every so often?

Admiral RUSSELL. Yes, sir.

Senator KEFAUVER. Just as you do anybody else?

Admiral RUSSELL. The way it is working out now he has 4 or 5 years and about 2 or 2½ years at sea. We call it "at sea." Of course, the Navy is pretty well shore-bound right now and there are not actually many of them cruising. He rides around in a tender and takes care of the legal matters over there and it is not confined to courts martial either. Foreign claims and international law and that sort of thing.

We have another officer on duty on the staff of the government of Guam. I might say that he has had his hands full in the last 2 or 3 years.

Senator KEFAUVER. Thank you very much, Admiral. Did Captain MacDill have any remarks?

Captain MACDILL. No, sir. I was just here to assist.

Senator KEFAUVER. And back up the Admiral?

Captain MACDILL. That is right.

Senator KEFAUVER. Major General Harman, Judge Advocate General of the Air Force, the committee is glad to have you here and the record will show that you were requested by the committee to come and give us your views; and we would be glad to have your statement at this time.

## STATEMENT OF MAJ. GEN. R. C. HARMAN, JUDGE ADVOCATE GENERAL OF THE AIR FORCE

General HARMAN. I have no prepared statement, sir. I did not prepare a statement. I will be glad to answer any questions.

Senator KEFAUVER. Yes. We understand. Will you tell us about any provisions of this bill that you feel are bad and not in the interests of service or justice to military personnel?

General HARMAN. I think on the whole, Mr. Chairman, it is a good bill. I think it is along the lines of unification. There are a few things about it that I personally do not like.

The first one I would like to mention is article 26. I think the law members should—I do not like to see the law member shorn of his powers that he has now. I think he should participate in the deliberations of the court and vote as he does now, rather than as the bill provides.

Senator KEFAUVER. The bill does not provide for him voting?

General HARMAN. It removes him from the court, sir. That is what I meant. I meant the proposed bill changes his position from the way he is now. That is what I meant to say.

Article 27 provides that the trial counsel and the defense counsel shall both be lawyers, and my only objection to that, sir—and these, too, are my personal objections—is that we simply do not have enough lawyers in the Air Force, and I think we are going to have trouble in getting enough lawyers to serve in all those capacities.

Senator KEFAUVER. So you would add the words "if they are available"?

General HARMAN. Yes, sir; 28 also alludes to the same as 26. It is with reference to the law member, and what I have said about 26 applies to that, too.

Sixty-six is the next note I have. That was the one that I understand was put in at the request of the Coast Guard, being that boards of review shall be officers or civilians. I do not believe it was contemplated that civilians were to be used on the boards of review in the Army or the Air Force.

I see no particular objection to having civilians serve on the board of review if they are men of sufficient experience in the administration of military justice to act.

Sixty-seven, the court of military appeals. I do not believe that should be restricted to civilians. I think it could be either military or civilians, with representatives of both on that court.

Senator KEFAUVER. What would you say about a provision that they should be selected: In order to be eligible you must have had military justice experience?

General HARMAN. I certainly think they should have military justice experience, whether they are military or civilian, on that court. I would probably favor that.

The only other one I have, Mr. Chairman, is with reference to the appellate counsel as set forth in 70. The duty of appellate Government counsel: I think that that might develop into a kind of an office squabble in the office of the Judge Advocate General of the various services. You would have to have Government counsel furnished.

Those are the only ones I have, sir.

Senator KEFAUVER. At this point I ask Mr. Larkin, page 58, subsection B: What is the Government counsel that the committee had in mind?

Mr. LARKIN. The notion there, Mr. Chairman, was to make a statutory provision so that in the review of a case on appeal, either before the board of review or the court of military appeals, that there be a provision that the Government and accused both be represented.

At the present time, in both systems the review is carried on generally in the form of a reading. In the Army, I believe they do sit as a tribunal, and counsel may come in and appear before them on request. I do not think that is the commonplace manner in which a record is reviewed, however.

It was the notion of the committee that, in strengthening the appellate phase of it—and they felt that the scheme set out does strengthen it—that they should go further and have these tribunals actually hear argument under certain circumstances. And when that becomes necessary, that there be counsel provided to present the argument to the tribunal that is reviewing the case. So that in addition to reading the record, they may have the different objections or the different points that are claimed to be error brought out in argument before them.

For that reason, these provisions were placed in here.

Senator KEFAUVER. Who is the appellate Government counsel and who selects the counsel?

Mr. LARKIN. The Judge Advocate General will select the Government counsel from his own staff—the people in his office—where there is to be such an argument.

The accused may have his own or have civilian counsel represent him before these appellate tribunals. But if he does not, then the judge advocate will appoint an officer from his office to defend or at least present the accused's side of the case.

Senator KEFAUVER. General Harman, do you have any other observations?

General HARMAN. No, sir; I do not. I would be glad to answer any questions you may have.

Senator KEFAUVER. Senator Morse?

Senator MORSE. I have only one or two questions. What is your position regarding the recommendation of the American Bar Association that the authority of the commanding officer should be diminished in our court-martial system?

General HARMAN. With reference to what?

Senator MORSE. With reference to the appointment of the prosecutor and the appointment of the court.

General HARMAN. I personally have never been embarrassed by command influence, Senator. However, I think that there should be all of the elimination of command influence that can be brought about in the bill. I have never been embarrassed myself, however.

Senator MORSE. It seems to me as we study the record to date of these hearings, of the several great differences that have developed within the hearing, that is No. 2. I think the difference of opinion on that is perhaps more pronounced than any other issue before the committee, and we have this study of the American Bar Association that seems to give great emphasis to that point.

Not having had active experience in military justice—whatever I know about it I know only from the standpoint of the books and the studying of the complaints that have been made to me as a member of this committee—I think it is one of the first decisions we have to make: whether or not we are going in the direction of the American Bar Association recommendations or in the direction of other witnesses who seemed to feel that discipline would be sacrificed if you reduced the authority of the officer in command. What is your judgment as to what would happen to discipline if you reduced the authority of the commanding officer?

General HARMAN. Well, you have the two extremes. You have the preservation of discipline on the one hand and the elimination of command influence on the other and you do not want to sacrifice discipline to accomplish this other. I do not go as far as some articles I have read, where they go to the *n*th degree to eliminate all control. I do not go that far at all.

I think, however, that the administration of military justice generally should be completely taken away from command so that the Judge Advocate General and his office does have the sole right to administer justice after the man has committed the offense and the commanding officer has decided that he is to be investigated for it and various steps going up to court martial after that.

I do not believe that command should exert any influence then in the trial and completion of the case from that point.

Senator MORSE. One other point and then I am through with this witness, Mr. Chairman. Another line of criticism that we get as members of the committee—and it is brought out also in some of this testimony but more particularly in the various articles that we read concerning reform of military justice—it seems to me that so many of the civilian writers, in contrast to men who have had actual experience with military justice in the field, dwell on the point that we have gone too far afield in military justice, adopting procedures that are not corresponding to or comparable with procedures in civilian cases in our civilian courts.

Do you think there is any real basis for that sort of criticism?

General HARMAN. No, sir.

Senator MORSE. There is certainly no basis for it, is there, as far as your rules of evidence are concerned?

General HARMAN. No, sir. I think a man gets just as fair a trial in a military court as he does in a civilian court.

Senator MORSE. What do you think of the suggestion that you read in some of the articles: That if we are going to democratize the Army, as is frequently said, we need to have on our courts of court-martial personnel other than officers—mixed personnel, officers, and enlisted men. What about that suggestion.

General HARMAN. I think that is all right. We are practicing that now. This system started February 1, 1949.

Senator MORSE. In the Elston bill?

General HARMAN. Yes, sir; in the Elston bill.

Senator MORSE. Do you think it is working out all right?

General HARMAN. Yes, sir; as far as I can see in the short time, it is.

Senator MORSE. But other than the allegations that you sometimes read that the matter of proof before a military court does not give you the same guaranties as matter of proof before a civilian court which you decide, and which as far as I can find out from my reading, most military men deny, and simply point to the procedure as their answer, and the criticism that we need to democratize the military justice proceedings more in order to do what these critics say is justice, and which you again say has been answered by the Elston bill.

Do you know of any other criticisms of military justice that this committee should give its attention to as they are set forth in the writings on the subject?

General HARMAN. I believe not.

Senator MORSE. You have no particular objection to the so-called military court of appeal of the present proposed bill?

General HARMAN. Excepting the one I mentioned, that I think it should be either military or civilians, and it should turn on the question of qualifications. The test should be the qualifications of the man rather than the color of suit he happens to be wearing.

Senator MORSE. No further questions.

Senator KEFAUVER. General, in the Air Force you do not have a separate Judge Advocate General Corps?

General HARMAN. No, sir.

Senator KEFAUVER. What do you think about a separate Judge Advocate General Corps?

General HARMAN. The official position of the Air Force, Mr. Chairman, is that the Air Force does not want a Judge Advocate General Corps. Unfortunately, on that particular point I disagree with the official position of the Air Force. If you want my personal opinion, I shall be glad to tell you.

Senator KEFAUVER. We would like to have it.

General HARMAN. My personal opinion is that the last four sections of the Elston bill should apply to the Air Force just as it does the Army, and under that we would have a Judge Advocate General Corps. I think the professional standing of the judge advocates would be retained.

You have to have lawyers in a group, who have their efficiency reports written by other lawyers, in order to attract young lawyers to come into the Judge Advocate General Corps or into the Air Force to make a career in the legal department.

Senator KEFAUVER. What do you think about the proposal to have one Judge Advocate General for all the services?

General HARMAN. I would see no objection to it. However, I think even under the uniform code it will operate well to have the code administered by three sets of people—that is, the Army, Navy, and Air Force each will take care of the administration of the code as it applies to the particular service rather than having one over-all group that administers it on all, because each group of us are acquainted with the customs of our own service, and if we are bound to apply one set of laws to that service, I think uniformity will be preserved rather than by having to have one Judge Advocate General for all three services and one group of lawyers under him to administer it.

Senator KEFAUVER. Do you think any appreciable amount of money could be saved by merging the three judge advocates general?

General HARMAN. No, sir; I do not. I do not believe so. I think it would take just as many people, Mr. Chairman, to do the job as it is taking now.

Senator KEFAUVER. Thank you very much, General Harman. If you have any proposals for amendments to set forth any views given we would be glad if you would send them to the committee.

General HARMAN. All right, sir.

Senator KEFAUVER. The committee has heard everyone who has expressed a desire to be heard. We wish to get every point of view and to shut off no one who feels they have a contribution to make to the subject under discussion.

Is there anyone else here who would like to testify or to make a statement?

(No response.)

Senator KEFAUVER. I see you are smiling, Admiral Russell.

Admiral RUSSELL. No, sir. It occurs to me that there is a member of the Coast Guard here, sir. That is all.

Senator KEFAUVER. Oh, yes.

## STATEMENT OF COMMANDER H. J. WEBB, UNITED STATES COAST GUARD

Commander WEBB. Mr. Chairman, the Coast Guard and Treasury Department know that Mr. Larkin has the viewpoint of the Department well in mind and can express the position of the Department very

ably. I can only say that the Department is 100 percent behind this bill and feels that it is a step in the correct direction to improve the administration of military justice.

Senator KEFAUVER. We appreciate that statement. May I ask if on page 53, line 12, if the words "or civilians" were added upon the suggestion of the Coast Guard? That is the composition of the board of review.

Commander WEBB. Yes, sir. As originally drafted this read "officers only." The Department requested the committee to add in the nature of an exception the word "civilians" because civilians have always reviewed the Coast Guard cases, and it was requested to be in the nature of an exception for the Coast Guard.

The Department wishes to make it clear that there was no intention to request this for any service, for any of the armed forces but the Coast Guard, but the committee accepted it in this fashion.

The Department felt that perhaps it had done an injustice to the major armed forces and wanted it to be clear as stated in the House record that the request was for the Coast Guard only, and there was no intention of advocating any civilians on these boards of review for any armed force but the Coast Guard.

Mr. LARKIN. I might be able to point out the committee's reason for adopting that, Mr. Chairman. Just as Commander Webb points out, the Coast Guard requested the added provision for themselves. When the idea was presented to the committee, they decided that they might as well make it general since the appointment of such civilians in any of the armed forces was entirely within the power of the respective judge advocates general.

It is not in the nature of a mandatory provision at all, and in the event they wish to appoint civilians they could, and if they did not it would have no effect whatever. But it is our opinion exactly as Commander Webb pointed out.

Senator KEFAUVER. How many lawyers do you have at present in the Coast Guard?

Commander WEBB. At the present time approximately 28 only.

Senator KEFAUVER. Do you consider that a legal corps—a Judge Advocate General Corps?

Commander WEBB. No, sir. The position of the Department is that the number required is so few that it would be totally unreasonable to separate them in any way from the other officers. The feeling within the Coast Guard is that officers should be put into one promotion line, and steps have been taken to attain that end within the last 15 years, on several occasions, and the trend is definitely away from any compartmentation such as that.

I might add, Mr. Chairman, that present plans are that we will eventually need 50 lawyers in order to carry out the provisions of this proposed bill.

Senator KEFAUVER. You now have 28?

Commander WEBB. Yes, sir.

Senator KEFAUVER. Thank you very much, Commander Webb.

Commander WEBB. Thank you, Mr. Chairman.

Senator KEFAUVER. If there are no further witnesses we will place in the record at this point statements now before the committee and any information which is subsequently received and considered by the

committee: (1) Statement of Mr. Knowlton Durham, chairman, Special Committee on Administration of Military Justice, New York State Bar Association; (2) letter from Senator Tobey to the chairman of this subcommittee; (3) letter from Mr. Arthur Farmer to the chairman of this subcommittee; (4) letter from Mr. George A. Spiegelberg to the chairman of this subcommittee; (5) statement of Mr. F. V. P. Brya, Bar Association of the City of New York.

(The material referred to is as follows:)

MAY 16, 1949.

*To the Committee on Armed Services, United State Senate, Washington, D. C.:*

On behalf of the Special Committee on the Administration of Military Justice of the New York State Bar Association I respectfully submit the following statement of its views concerning the proposed uniform code of military justice bill (S. 857). This committee was appointed during the summer of 1946 to make its own inquiries along lines similar to those then being carried on by the War Department Advisory (Vanderbilt) Committee. Its 14 members are all veterans of the Army, Navy, or Air Corps who served during one or more wars, and all but two have been either members of the Judge Advocate General's Department or at various times have been detailed to the work of that office. Through the then chairman of the committee, Judge Philip J. McCook, it kept in touch with the War Department committee.

When the War Department committee's report was published, our committee found that while it disagreed with its recommendations in several respects, it was generally in accord with its approach and premises.

Meanwhile the House Committee on Military Affairs had been conducting its own inquiry and had issued its report dated August 1, 1946, comprising some 16 recommendations. These were all carefully considered by us, and while we agreed with most of the recommendations, we disagreed with a few, and supplied some original thoughts of our own.

We submitted our original report to the seventieth annual meeting of the New York State Bar Association on January 24, 1947, and it was by vote of the members present adopted.

Since then the Elston bill affecting the Army before unification has been enacted into law, and the majority of our recommendations have been disposed of, generally speaking, in a manner satisfactory to us .

Now, your committee has before it for consideration S. 857, a bill to provide a Uniform Code of Military Justice. In the hope that our evaluation of the proposed legislation may be helpful to you in your consideration of this bill, we have prepared the following summary of our study.

From first to last we have believed, argued for, and emphasized the principle that the judicial system of the armed services should not be removed from command control.

The uniform code wisely continues the authority to convene the court in the commanding officer (arts. 22, 23, 24). The initial action on the record after trial is also taken by the convening authority (arts. 60, 61, 62, 63). These provisions are substantially the same as present Army and Navy procedure. Provisions for review by boards of review constituted by the Judge Advocate General (arts. 63, 66) are substantially similar to the present Army system of review. Finally, there is a wholly new provision for review by a Judicial Council (art. 67) with provision for appellate counsel (art. 70). Improper interference by the convening authority or any other commanding officer, with the court or with "any member, law officer, or counsel thereof" is prohibited (art. 37) and is made punishable (art. 98).

In our original report to the New York State Bar Association, above referred to, we presented a number of objections to recommendations contained in the Report of the House Committee on Military Affairs (Rept. No. 2722, August 1, 1946). Our most important objections have either been recognized or otherwise disposed of to our general satisfaction in the subsequent enactment of the Elston bill.

On the question of separation of courts martial from command we know that separation will be pressed for by its advocates, as it has been by the Vanderbilt committee, the American and other bar associations. We urge the contrary view, as we have from the beginning. We agree with Judge Patterson, who has repeatedly said:

"It would be unwise to have particular functions within the Army carried out by officers who are independent and separate from command and the responsibilities which go with command."

We also agree with General Eisenhower, in his statemnt to members of the New York Bar at the Lawyers Club on November 17, 1948, that:

"This division of command responsibility and the responsibility for adjudication of offenses and of accused offenders, cannot be as separate as it is in our democratic government.

"Somewhere along the line * * * the man who makes the final decision must have also on his shoulders responsibility for winning a war; and please never forget that."

The success of an army depends upon its commander. His is the responsibility to maintain discipline in the command. So also must he bear the responsibility for the proper administration of the system of justice within his command.

Because we find some abuse of authority gives no sufficient reason for abandoning the cardinal principle of unity of command. The Proposed Uniform Code makes provision for correcting abuses. It wisely continues this essential function of discipline substantially as it was under the previous Articles of War and Articles for the Government of the Navy, leaving responsibility for the administration of military justice where it properly belongs, on the shoulders of the commander who is responsible for the conduct of the war. We emphatically disagree with the views on this subject, as expressed by the chairman of the special committee on military justice of the American Bar Association, to your committee, on May 4, 1949. This principle is so fundamental that we believe it cannot be overemphasized.

Our committee is unanimous in favoring the adoption at this time of a uniform code for the three services.

With respect to proposed articles 16, 26, 39, and 51, which deprive the "law officer" of the right of any vote on the findings and sentence and exclude him from the deliberations of the court, a minority of our committee feel that the law officer in the average court martial is the best qualified officer on the court, that he acts as a balance wheel to keep the court in line and should retain his present right to take part in deliberations of the court, including the right to vote. The majority of the committee, however, feel that the proposed change would elevate the law member, rather than lessen his importance and that, under this provision, he will assume more of the position of an unbiased judge, as in a civilian case, an advantage which would outweigh the objections to the proposal.

With respect to the proposed article 66 (a), which provides for the appointment by the Judge Advocate General of each of the armed forces of one or more boards of review, our committee, with only two dissents, favors the change proposed by this article. It is believed by the majority, that although certain powers are taken away from the Judge Advocates General under the proposed legislation, nevertheless through the power of appointment of the members of the boards, they do retain the power to appoint to the boards qualified personnel and that this provision is a sufficient guaranty that the system of review will be competently handled.

The proposal to create a judicial council composed of civilians only, as set forth in article 67, is opposed by a majority of our committee who feel that this provision will prove detrimental to the administration of military justice, and that the final review of court-martial cases should not be removed from the military and turned over to civilians to be appointed by the President alone, without the advice or consent of the Senate.

The committee is also opposed, one member dissenting, to the proposed article 2 (3), giving courts martial jurisdiction over reserve personnel in inactive training duty.

Our committee, two members dissenting, favors the proposed article 27 (b) requiring that trial counsel and defense counsel be lawyers, and also article 58, permitting confinement in a penitentiary for any offense. With respect to this provision, we had the great advantage of hearing the report of our former chairman, Judge McCook, whose duties during World War II required him to study and make recommendations with respect to penology as applied in the Army and the Navy. We have also considered reports that the Navy system as incorporated in proposed article 58, which permits the transfer of court-martial prisoners to institutions under the control of the Department of Justice, is beneficial both to the service and the prisoner. Under the Navy system opportunity is presented to segregate psychopaths and more serious offenders from others and to provide for their rehabilitation. It is considered by our committee

that this legislation would, undoubtedly, be supplemented by administrative regulations designed to prevent any abuse of the proposed system.

From the foregoing, you will see that our committee after further opportunity for study of the proposed code, still believes that on the whole S. 857 is a good bill and that with the two exceptions noted, viz- the appointment of a judicial council composed of civilians and the proposal for courts martial jurisdiction over reserve personnel, it should be enacted.

Respectfully,

KNOWLTON DURHAM,
*Chairman, Special Committee on Administration of Military Justice,*
*New York State Bar Association.*

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UNITED STATES SENATE,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
*June 2, 1949.*

Hon. ESTES KEFAUVER,
*Chairman, Subcommittee of the Committee on Armed Services,*
*United States Senate, Washington 25, D. C.*

DEAR SENATOR KEFAUVER: I am writing to you with reference to H. R. 4080, a bill to establish a Uniform Code of Military Justice, upon which you have recently held hearings.

When the House Armed Services Subcommittee was considering the original bill (H. R. 2498), I sent Mr. Robert D. L'Houreux, counsel for the Senate Banking and Currency Committee, to present my views upon this legislation. His testimony is carried on pages 808 to 825 of the hearings on that legislation. As stated on page 810 of those hearings, Mr. L'Houreux represented my views upon the matter.

While some of the changes suggested by me were made in the bill, I was somewhat disappointed and disillusioned when the House adopted H. R. 4080, which leaves untouched most of the substantial evils contained in H. R. 2498.

I had intended to appear before your subcommittee to present those views, but I was detained here and out of town upon official business, and it was impossible for me to do so. In the meantime, the Judge Advocate General of the Army and the Judge Advocate General of the Air Corps appeared before you and suggested most of the changes that I had advocated before the House subcommittee and other amendments which are also worthy of thorough consideration. It is my sincere hope that your subcommittee will consider incorporating into H. R. 4080 most of the changes suggested by the Judge Advocate General of the Army. If those changes are not made, I am convinced that it would be much preferable to allow the present military law to stand. I am for a uniform code of military justice, but not at the expense of basic rights now guaranteed to the average soldier and officer.

If H. R. 4080 is reported substantially without changes by the Armed Services Committee, I shall consider it my duty to bring the facts to the attention of the Senate by introducing the bulk of the amendments proposed by the Judge Advocate General of the Army and discuss them thoroughly upon their merits. It means inconceivable to me that the Congress will disregard the benefit of the experience of the Judge Advocate General of the Army, who has had such thorough and first-hand experience upon the matter.

If your hearings have not yet been printed, I would appreciate having this letter incorporated therein.

Sincerely yours,

CHARLES W. TOBEY.

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STERN & REUBENS,
*New York, N. Y., May 6, 1949.*

Hon. ESTES KEFAUVER,
*Senate Committee on the Armed Services,*
*Senate Office Building, Washington, D. C.*

MY DEAR SENATOR KEFAUVER: In response to the request that you made of me at the conclusion of my testimony respecting the proposed Uniform Code of Military Justice before your subcommittee on May 4, 1949, the following are the changes in the code which I believe important. These, of course, are in addition to the basic amendments designed to eliminate command control of the courts which form part of the material submitted by Mr. George Spiegelberg.

1. Article 104 of the Army's Articles of War presently provides that the commanding officer may impose disciplinary punishment upon persons of his command without the intervention of a court martial unless the accused demands trial by court martial.

Article 15 of the Uniform Code omits the qualification which gives the accused the right to demand trial by court martial. That means that under the Uniform Code personnel may be punished, however unjustly, by their commanding officer in the manner described in article 15, without recourse to trial by an impartial body.

I believe this omission to be wrong, both morally and from the standpoint of morale. The fact that discipline may be maintained while reserving to personnel the right to demand trial as an alternative to accepting disciplinary punishment from a commanding officer, is proved by the fact that A. W. 104 has existed in its present form for nearly 30 years. The Navy has no such provision, but historical precedent should not furnish an excuse for the continuation of injustice.

For these reasons, article 15 should be amended by adding to subdivision (a) after the words "without the intervention of a court martial," the following words, which appear in the present A. W. 104: "unless the accused demands trial by court martial".

Subdivision (b) of article 15 should also be amended to read as follows:

"The Secretary of a Department may, by regulation, place limitations on the powers granted by this article with respect to the kind and amount of punishment authorized and the categories of commanding officers authorized to exercise such powers."

2. Under the uniform code, special courts martial have been given the power to adjudge a bad-conduct discharge. There is no provision for a law officer to serve on special courts martial, nor need trial counsel or defense counsel be qualified attorneys, as in the case of general courts martial. This distinction between special and general courts is justified because of military necessity, but the justification should not be carried to the point where a bad-conduct discharge may be imposed without the presence of a single qualified legal adviser. A bad-conduct discharge will be a stain on a man's record throughout life and will seriously affect his opportunities to obtain employment and his changes for advancement. Such a stigma and the imposition of such a handicap should not be imposed unless a law officer shall sit as a member of the court to guide it in its reception of evidence and in the application of the relevant law.

It is, therefore, strongly urged that article 19 be amended by adding the following words at the end: "and unless a law officer, qualified as set forth in article 26 (a) hereof, shall be appointed to the court and shall be present throughout the trial."

3. The final amendment to be suggested is technical. In H. R. 2498, article 66 (e) provided that within 10 days after any decision by a board of review, the Judge Advocate General may refer the case for reconsideration to the same or another board of review. Upon the strong representations of several witnesses who appeared before the House committee, this subdivision was stricken from article 66 in H. R. 4080, which was passed by the House yesterday. Nevertheless, H. R. 4080 contains the provision in article 70 (c) that it shall be the duty of appellate defense counsel to represent the accused—"(3) when the Judge Advocate General *has requested the reconsideration of a case before the board of review or* has transmitted a case to the Court of Military Appeals."

It would seem that the italicized words have been permitted to remain in this article by oversight. They should be stricken.

In view of the possibility that you may not have seen the editorial entitled "For Military Justice" which appeared in the New York Times this morning, I enclose a copy of that editorial.

The coverage of your subcommittee's hearings by leading newspapers and the appearance of this editorial indicate that the subject of a decent code of military justice in the armed services, and in particular the divorcement of the courts from command control, is a matter of great interest to the American people. The House Committee on Armed Services states in its report, page 8, "we fully agreed that such a provision might be desirable if it were practicable, but we are of the opinion that it is not practicable." The desirability of this reform appears to be practically universally conceded, and not a single substantiating fact to bolster the conclusion of impracticability has been stated. I believe that in my testimony before your subcommittee I demonstrated that

the services had themselves, during World War II, adopted such systems, in several instances, as refuted their present claim that the system would be impracticable.

May I therefore urge, certainly not in my own behalf, but in behalf of those millions of American citizens who are now serving and who will hereafter serve their country in its armed forces, that your committee consider favorably the reforms in the court-martial system which have been advocated by the American Bar Association and by my own association.

Sincerely yours,

ARTHUR E. FARMER,
*Chairman, Committee on Military Law, War Veterans Bar Association.*

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AMERICAN BAR ASSOCIATION,
SPECIAL COMMITTEE ON MILITARY JUSTICE,
*May 6, 1949.*

Hon. ESTES KEFAUVER,
*United States Senator from Tennessee,*
*Senate Office Building, Washington, D. C.*

MY DEAR SENATOR: On behalf of the American Bar Association and on my own behalf, I want to thank you for the very courteous reception I received from your committee on May 4 when I testified with respect to necessary amendments to the proposed Uniform Code of Military Justice (S. 857).

I am taking the liberty of enclosing a copy of an editorial which appeared in the New York Times on May 6, 1949.

As I stated at the hearing, I know that the American Bar Association will be glad to assist in any proper way possible to assure the adoption of the amendments necessary to effect real reform in military justice.

You have probably noted that the House passed the bill without the required amendments and that House Report No. 491, the report of the House Armed Services Committee, states in substance at page 8 that the witnesses who appeared before that committee were opposed to command control of the courts, but the committee believed that change was impracticable, although they stated no reason for their views. I should also like to say that Prof. Edmund Morgan, chairman of the committee which drafted the uniform code, expressed a similar view in a letter written to the secretary of the American Bar Association on March 1, 1949, and repeated that view in his testimony before the House Armed Services Committee. I have his permission to quote from that letter and the subsequent one received by me, so long as I make it clear that the views expressed by Professor Morgan are his "recollection and interpretation of the views of the committee."

In the letter of March 1, Professor Morgan said:

"It was the opinion of our committee that it would be entirely impracticable to have such appointments (the appointment of the court) made by the Judge Advocate General's Department without the closest cooperation with the command officers concerned. This would necessarily mean that the function would be delegated to the local representative of the Judge Advocate General's Department."

Upon receiving a copy of Professor Morgan's letter, I pointed out to him that our proposed reform did not envision the appointment of the court by the "local representative" of the Judge Advocate General's Department attached to a division, but rather by the Judge Advocate General's Department representative at a higher echelon, at least in those cases where there was evidence of command interference with the functions of the court. In response to my letter, Professor Morgan wrote as follows:

"As to the plan which you propose for eliminating command control, I agree that if each division commander is required to furnish a list of officers for court martial duty to the Army commander, and if there is a statutory provision that the local Judge Advocate General will select the court for any division from officers of other divisions, you will secure much more freedom from command control of the trial courts; otherwise, I am still from Missouri."

In view of the fact that our proposed reform does permit the selection of the court for any division from officers of other divisions, it follows that this is a method for freeing the court of command control which Professor Morgan believes to be effective. As to its practicability, I refer you to the testimony of Mr. Arthur Farmer of the Veterans Bar Association who gave specific instances in the last war in which traveling teams administered justice to isolated units.

What was practicable under the existing method is surely as practicable under the proposed reform.

I trust you will pardon the length of this letter, but the last opportunity for effective court-martial reform is now in the hands of your committee and the Senate.

I am taking the liberty of enclosing four copies of this letter in the hope that you will see fit to distribute them to the members of your subcommittee.

Yours sincerely,

GEORGE A. SPIEGELBERG.

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STATEMENT BY FREDERICK V. P. BRYAN, CHAIRMAN, SPECIAL COMMITTEE ON MILITARY JUSTICE OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK

As chairman of the special committee on military justice of the Association of the Bar of the City of New York, I appear before your committee on behalf of that association. The association is the senior bar association of New York, and has a membership of 4,750 lawyers throughout the greater city.

The association, through its military justice committee, has made a thorough study of the court-martial systems of the armed services, and has followed carefully the progress of the proposed reforms which have been before the Congress. As lawyers, we are deeply concerned with the administration of justice as it affects millions of young Americans. Nonetheless, we are fully cognizant of practical military necessities and requirements and well aware that we are dealing with military justice and not with justice in the abstract.

In this connection, I might mention the fact that I served in the Air Force in the last war for 4 years, 3½ years of which was overseas. During the major portion of that period I was deputy chied of staff of the Second Air Division of the Eighth Air Force, with the rank of colonel, which division was continuously engaged in heavy bombardment combat operations against the enemy. As part of my duties, I was concerned with the administration of the court-martial system for 55,000 officers and men. On occasion I have served as trial judge advocate, defense counsel, law member, member and president of general courts martial. All of the members of our committee have also had wide practical experience with the system in the field, either in the Army, Navy, or Air Force.

We do not believe that the need for extensive court-martial reform is any longer seriously questioned. All boards and agencies which have made a study of the subject are in agreement on this score, and discussion with great numbers of Army and Navy personnel, both officers and men, who are familiar with the court-martial system completely confirms that view. The question before your committee is, therefore, whether or not the proposed Unified Code of Military Justice accomplishes the reforms of the system which are essential.

The term "military justice" should not be an anomaly, for there is nothing inconsistent between the word "military" and the word "justice." What is required is a system which administers justice with fairness and objectivity and with full protection for the respective rights of the accused, on the one hand, and the prosecution, on the other. A system which achieves this inspires confidence in the personnel whom it governs and tremendously heightens their morale. A system which fails to do so can only result in the lowering of morale and is unworthy of the American tradition.

We are happy to be able to say that H. R. 2498 goes a long way toward accomplishing this objective and is a great improvement on previous legislation of this character. The committee which drew the uniform code of military justice and its staff are to be highly commended for the work they have done, particularly in view of the delicate balance required to meet the varied views of the three armed services.

We believe that H. R. 2498 is a very able and well-drawn piece of legislation. Speaking generally, it provides a clear, workable, and uniform code for the administration of military justice, and in this respect alone fulfills a long-felt need. Furthermore, it makes a large number of important changes which will improve the administration of military justice in many major respects. It has also clarified and arranged in orderly fashion a whole mass of provisions which were difficult to understand and often obscure.

I wish we could go further and say that this bill presented the ultimate answer to the problem of military justice reform. Unfortunately, we cannot say that, for the reason that, as I will point out later, the bill is deficient in one vital respect,

which affects the heart of the whole matter. However, the bill as a whole is a good one, as far as it goes, and I want first to mention a few specific examples of its many excellent features.

One major criticism leveled at the old system of military justice was that the rights of the accused were all too frequently prejudiced because of the lack of capacity of defense counsel. The proposed bill corrects this situation by requiring in article 27 that both trial counsel and defense counsel in general courts must be fully qualified specialists in the law, and in special courts that the defense counsel have the same qualifications as the trial counsel. These provisions greatly strengthen the system by protecting the essential right of the accused to have his case fully and competently presented.

The salutary provisions of article 38, subdivision c, permitting the filing of briefs by defense counsel for consideration by the reviewing authority should also be noted.

Articles 26 and 51, prescribing the qualifications and duties of the law officer of the court, are particularly sound. The law officer, who must be a fully qualified lawyer, becomes in effect a judge, with the power to determine all questions of law during the course of the trial on the basis of his specialized knowledge. The lay members of the court perform the functions of a jury and pass upon the facts under appropriate instructions from the law officer. This is a proper separation of the judicial function and the fact-finding function, which should prevent overreaching by the President and lay members of the court and make for a record which is susceptible of intelligent review. We heartily endorse these provisions.

The provisions of the proposed code as to review are in general good and represent a great improvement over the cumbersome review machinery provided by the Elston Act. While we differ on such details as the right of the Judge Advocate General to refer a case for reconsideration to another board of review, if dissatisfied with a decision (art. 66e), nevertheless the review provisions provide a proper and appropriate method for review of the trial record. Boards of review are properly given the power to consider weight of evidence.

We particularly commend the provisions as to the Judicial Council. Such a body, tantamount to a supreme court of military justice, has long been necessary. The qualifications of its members and the perquisites and compensation granted them will, we hope, ensure that it will be composed of men of judicial caliber. It will be able to establish a body of case law, which will implement the provisions of the code and furnish general standards for the administration of justice in the various types of situation with which courts throughout the armed services are confronted. It should also afford a great measure of protection against abuses of the system.

The annual survey of the operation of the code made by the Judicial Council and the various judge advocates general should be most useful in securing uniformity on questions of policy and in the development and improvement of the machinery of justice.

These are but a few of the many excellent provisions of H. R. 2498. However, we cannot give any unqualified endorsement to this bill when it has failed to remedy the most important single defect in the old system.

The major criticism of the system of military justice as it operated during the war was that the courts which tried the accused were subject to the influence, if not the control, of command, and such influence or control was frequently exercised. As stated in the report of the War Department Advisory Committee on Military Justice, dated December 13, 1946, at pages 6 and 7:

"The committee is convinced that in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence their decisions. * * * Not infrequently the members of the court were given to understand that in case of a conviction they should impose the maximum sentence provided in the statute so that the general, who had no power to increase the sentence, might fix it to suit his own ideas."

A system of "justice" in which there is placed in a single individual the power (*a*) to order the arrest of an individual; (*b*) to prefer charges against him; (*c*) to appoint counsel for both defense and prosecution; (*d*) to appoint the trial court from among persons who are subject to his control or domination; and (*e*) to review the decisions of such courts, is abhorrent to every concept of American justice. For when such power may be wielded, the temptation is almost irresistible, however well-intentioned the motives, to use it to influence or control decisions as to guilt or innocence, and as to sentence.

There is only one way to prevent the frequent exercise of such power and that is to remove from command the power to control or influence the courts.

We agree that maintenance of discipline is a function of command. But there is a clear distinction between the right of command in the exercise of that function, to order an accused to trial and control the prosecution (which are undoubtedly command functions), and the right or power of command to influence the court in determining the guilt or innocence of the accused and the sentence to be imposed upon him. The later are powers which command in theory expressly disavows and should never exercise. Command must be prevented from exercising them in the future as it has in the past.

This can be easily accomplished without withdrawing from command a single power necessary for the maintenance of discipline. The commander must retain the power to prefer charges, to refer them for trial, and to control the prosecution of the case. But once the case has been referred for trial, then the processes of objective justice should be free to operate. This is the line of division, and from this point forward an independent judicial arm of the service should be responsible for seeing that justice is done.

This judicial authority should convene the court, and appoint its members. It should also appoint defense counsel. The members of the court should be appointed from panels selected by commanders and submitted to the convening authority. The convening authority should be on a sufficiently high level so that the panels will afford a wide range of selection, and, in the cases where justice requires, a court may be appointed, composed of officers and men from units other than that of the accused.

When a case has been decided, the record should pass to the judicial arm for review, subject only to the right of the commander to exercise clemency or remit the sentence.

The proposed Uniform Code of Military Justice draws no such line of division. It leaves in the hands of the commander all of the powers which enable him to influence or dominate the court, and thus perpetuates the major evil of the old system. This is the opportunity to correct this evil, and to make the excellent proposed code into legislation which will complete the reform of military justice which has so long been necessary.

It must be remembered that the American armed services in time of war and now in time of peace are citizen-armed services. Their fighting capacity is dependent upon their morale. Morale will never be so high as when the individual soldier, sailor, or airman is convinced that he will get a square deal under a system of justice which is in accord with his traditional philosophy of what justice should be.

We urge upon this committee the passage of the proposed Uniform Code of Military Justice embodied in H. R. 2498, modified only by provisions necessary to withdraw from command the power to influence or control the courts. This Nation will then have a system of military justice which should insure to the members of its citizen armed services equal justice under law which is the right of every American.

Senator KEFAUVER. On behalf of the committee I want to express our thanks to you officers and civilians and all of you who have assisted the committee so much.

If there is nothing else that will terminate our hearing.

(Whereupon, the hearing then, at 4 p. m., Monday, May 9, 1949, adjourned.)

# UNIFORM CODE OF MILITARY JUSTICE

**FRIDAY, MAY 27, 1949**

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES,
*Washington, D. C.*

The subcommittee met, pursuant to adjournment, at 10:15 a. m., in room 212, Senate Office Building, Senator Estes Kefauver presiding.

Present: Senators Kefauver and Saltonstall.

Also present: Mark Galusha, of the committee staff; Felix Larkin, Assistant General Counsel, National Defense Establishment; Prof. Edmund M. Morgan, Jr.; John H. Simms, Office of the Legislative Counsel of the Senate; and Robert Haydock.

Senator KEFAUVER. Well, gentlemen, considerable time has elapsed since we completed our hearings on the uniform court-martial bill, because it has been difficult to find a time when we could all get together.

Some time ago the staff prepared a brief setting out the major points of differences of the several witnesses with respect to the bill. Because this is a rather lengthy and complicated bill, it appears that the best way to go about working on the bill is, insofar as possible, to settle these major points first. Once these are settled, the staff, with the help of Mr. Simms of the Office of Legislative Counsel and Mr. Larkin from the Defense Establishment, can then prepare the bill for further study by the subcommittee. By coming to an agreement on these major points first, I believe we will save the time of the subcommittee in the end.

At our first hearing on this bill Professor Morgan gave a general discussion of the bill. I presume that the Commission that prepared this bill, of which Professor Morgan was the chairman, heard the same points of difference that have been raised in our hearings. For this reason I have requested Professor Morgan to be present this morning to give us the benefit of the committee's views in arriving at their decision.

Professor Morgan, I want you to know that we appreciate your willingness to come here to assist us. Unless you have a statement to make at this time we will take up the points of difference as outlined in the brief prepared by the staff.

We have the letter here with eight points of controversy.

Professor MORGAN. Yes.

Senator KEFAUVER. First is control, command control.

Professor MORGAN. Would you like to have me go into those one after another?

Senator KEFAUVER. Yes, if you will.

Professor MORGAN. I am prepared to do it all right, I think.

Senator KEFAUVER. All right, sir.

I may state how I feel at this time about command control. I think there is considerable in the position of the American Bar Association, if it is feasible, and we would like to have your opinion about it.

Professor MORGAN. That is exactly the way we felt about it ourselves, Mr. Chairman—exactly the way we felt about it.

The question was, first, is it feasible; and then, second, is it a scheme which Mr. Spiegelberg suggests which will, for example, accomplish the elimination of command control.

What Mr. Spiegelberg has said is that nobody has shown that it would not work, and I can say, by the same token, he has not shown that it would work and his suggested amendments show it will not work.

The only thing that you can say about it is, generally speaking—we put this all up to the full committee, and I think maybe, Mr. Chairman, I ought to tell you how that committee was formed. Do you know how that committee was formed?

Senator KEFAUVER. Well, you have told us, but state it again.

Professor MORGAN. Yes. We had representatives of all the services present in the working group under Mr. Larkin; we had representatives of the Judge Advocate General's office from each service, and in the meetings of the full committee, each one of the Under Secretaries or Assistant Secretaries, had right at his right-hand a high-ranking officer of the Judge Advocate General of the service, and it was agreed at the beginning that whatever came out of the committee unanimously would be supported by each one of the services separately.

If there was a dissent, then the service would be free, if you wanted them to do so, to tell what their particular views were.

Now, on command control we considered this matter that Mr. Spiegelberg suggested. Mr. Larkin and I had a conference one evening for several hours with Mr. Spiegelberg, Mr. Farmer and Mr. Bryan, as well as one other——

Mr. LARKIN. Mr. Wels.

Professor MORGAN. Mr. Wels, yes, all of whom are in favor of controlling command control by the use of a panel of eligible court members.

We reported the result of that conference to the committee. Each member who had anything to do with the service said that it would be entirely impracticable, and I think you know that is the position that General Riter took before the House committee. I understand that he thought it might be possible under some circumstances here.

The details which the services gave us were these: Supposing that you have, to take Mr. Spiegelberg's example, an army with six or seven divisions, and according to his scheme, the commander of division 1 will select a group of persons eligible for court-martial duty. I do not know whether it includes enlisted men as well as officers, but he has got to select that group that he thinks could operate on a court martial for his division.

Each one of the division commanders makes a similar selection, and then they send that list to the Army commander.

The Army commander's judge advocate, whichever judge advocate is assigned there, then takes that list, and whenever there is a court martial for division 1 he sends down the names of the persons who are to be chosen for the court martial, you see.

Now, the point that he made to us was that—let us confine ourselves to division 1 first. How many men, how many officers is that going to take? How many officers is it going to take? They will have to have a court martial of five if it is a general court. If they have more than one court going at one time, they will have to have at least 10, and it would not do just to make a panel of 5 or 10 under those circumstances, because you would have to have considerably larger numbers.

Well, now, after that panel went up there, these men would be practically unusable by the commander of division 1. They would have to be set aside, so that whenever you had a court martial here all those men or the number that this man up here, this Judge Advocate General up at Army headquarters, would pick from that, so that meant that you would have to have those men practically isolated, and that would interfere with the orderly operation of division 1; and you do not know whether when the cases are enlisted men's cases——

Senator KEFAUVER. Professor Morgan, he said this would only occur where the staff judge advocate——

Professor MORGAN. Of the Army.

Senator KEFAUVER (continuing). Certified or contended that there would be an effort to direct the court by the commanding officer.

Professor MORGAN. Yes.

Senator KEFAUVER. And that it was only in those cases that you would get your personnel fro manother division.

Professor MORGAN. I am not talking about from another division; I am talking abut division 1 from the practicability standpoint.

Here is division 1 itself, and suppose the commanding officer picks them all from division 1. Suppose the Army Judge Advocate picks all the men from division 1; you have required the commander of division 1 to send to the Army's Judge Advocate General the list of men. Now, if when he sends down his list for this court martial they are on some other assignment, what are you going to do about it? He will have to have another list go up to the Army headquarters, and then there will have to be a new list selected, but if the thing is going to work under those circumstances, this group that has been picked out will have to practically be segregated for court-martial work, so that this Army commander of division 1 will not be able to use them.

Senator KEFAUVER. Why cannot the personnel of the court be picked as it is now, but if the Judge Advocate General feels that it is going to be directed or influenced by the commanding officer, then, in that event, why, use a court selected from some other division.

Professor MORGAN. Oh, surely. But how is the Judge Advocate General up here going to know whether the court will be affected by command? I am talking about this division now. Of course, you can see if the other five divisions have to keep men also, the other five may not only keep them for their own work, but you know that they might be transferred to another division, that is their scheme—now, I do not know anything about operations, but the men who have had experience that way, General Riter has had a lot of experience—he has said that would not work; that it is an interference with the orderly workings of the division, so that goes to practicability.

There are two issues there, Senator: One is practicability.

Granted that you could put this scheme into effect, and granted that the selection for division 1, first, is going to be made all from division 1, the commanding officer is not going to be allowed to select them, so they may; the Judge Advocate General up here is going to be allowed to select them—If the commanding officer sends up only the minimum number of names, if he does that, then he has selected the court martial, has he not?

Senator SALTONSTALL. Yes.

Professor MORGAN. So, he has got to send up more than the minimum, considerably more than the minimum number, has he not?

Senator SALTONSTALL. Yes.

Professor MORGAN. Then, what is going to happen? Suppose he has to send up twice the number for each court martial that is going to operate in division 1? There will have to be 10 officers, at least, because you do not know whether there are going to be 5 officers—there will have to be at least 2 courts—there will have to be 4 enlisted men for each court if the staff legal officer is going to have any choice, and there has got to be at least 4 enlisted men and 10 officers.

If those men have got to be available at the command of this JAG up here at the army headquarters, how can the division commander use those men except on purely temporary things in the meantime? Now, that is the point that the Army makes on practicability.

Then, if you are going to talk about it accomplishing the object, as long as the men who serve on that court are under the command of the division commander, as long as they are under that command, you have got just as much command influence, I do not care who chooses them; if that commander wants to use undue influence, and by the subtle means that they are talking about, he can use it on men of his command who are selected by the JAG just as well as if he selected them himself, and by that hypothesis they have got to be selected from the panel.

Senator KEFAUVER. I thought if there was danger of influence being used, the trial would be before a panel selected before another division.

Professor MORGAN. Now, the next question is who is going to determine whether there is danger of influence.

Senator KEFAUVER. Well, the staff.

Professor MORGAN. Which staff?

Senator KEFAUVER. In the division where the offense took place.

Professor MORGAN. Division 1?

Senator KEFAUVER. Division 1.

Professor MORGAN. Then, you are going to take officers over here.

Senator KEFAUVER. Yes.

Professor MORGAN. My point is that if you can do that, this staff judge advocate of division commander 1 is going to say that you cannot get a fair trial from your commander.

Senator SALTONSTALL. If you ask me, and I understand the issue now, I would agree with Professor Morgan. I do not think you ought to divorce it from command control; that is the issue that you want my opinion on.

Senator KEFAUVER. Yes.

Senator SALTONSTALL. I would say that I would rather leave it with the discipline necessary, and all that goes with it—I would rather leave it with the command control rather than divorce it entirely. That is my understanding of the issue.

Senator KEFAUVER. That is the issue.

Professor MORGAN. My point is, Senator, if you are going to do this, I think it is perfectly absurd for you to say that this group of officers from division 6 have got to come over here, that is, that you are going to disrupt division 6 by picking out officers from there, and requiring them to go over to division 1. If you are going to do this thing, it ought to be on the basis that you get it in the civilian courts, namely, get a change of venue, and the prisoner, the accused, should be sent over to division 6 for trial. That should be done just the same as sending him back to the base instead of——

Senator SALTONSTALL. Mr. Chairman, may I say this? Do I misunderstand the issue, Professor Morgan, when you say this: We have provided this very high court on the law; we have provided a board of review of the facts——

Professor MORGAN. That is right.

Senator SALTONSTALL. And if we have done those things, is not the accused amply protected from any influence?

Professor MORGAN. That is exactly the way our committee felt about it, Senator Kefauver. We said here that the thing that everybody objected to before was, one, the skin letters afterward; two, the commander actually calling the men in and telling them that he wanted a conviction there or he wanted a heavy sentence there, and so forth; that was the thing that was objected to.

Senator KEFAUVER. For morale purposes.

Professor MORGAN. Yes; for morale purposes. That is prohibited now, both by the Elston bill and by our bill.

The Elston bill did not put any punishment on it; we make it a military offense.

Second, the people who really objected to that were lawyers. Now, we have provided that you have a lawyer for your law officers—no "if available" about it; it is mandatory. You have a lawyer for counsel. The lawyers do not yield to influence of that kind as readily as line men or if they are just temporarily assigned to defend and to prosecute.

Next, when any serious sentence goes up, it goes to this board of review, as Senator Saltonstall has said. That board of review is in the JAG office. It is in the JAG office, and that is far removed from the local command control.

As a matter of fact, if you had a board of review, it might be at army headquarters or it might be at general headquarters of several armies.

Senator SALTONSTALL. I am ready to vote on that question.

Professor MORGAN. I do not want to talk too long.

Senator KEFAUVER. I feel this way about it: That I think the field that we might get into is too uncertain; it might be disrupting, but I think that in our report and in our discussion we might put the services on notice that this is a problem we hope that we have dealt with sufficiently and the addition of this penalty provision and other matters, and we are going to try it out as is.

Professor MORGAN. That is the way the House did.

Senator KEFAUVER. And we want the services to be on notice that we are watching to see whether there is going to be undue influence. So we will vote on the principle of this matter of command control to leave it as is.

We will pass on to the next thing. I believe it is the law officer, Professor Morgan.

Professor MORGAN. Well, the dispute on that is merely as to whether the law officer should go back with the court——

Senator SALTONSTALL. And vote as a member of the jury, so-called.

Professor MORGAN. And vote as a member of the jury.

Let me tell you the way the committee split on that, Senator.

The Under Secretary of the Navy, that is Mr. Kenney, wanted them to be just like a judge and not go back to deliberate with the court.

The Air Force said, "Well, we would prefer to have him go back with them, but that everything he does back with the court must be put on record," so that therefore you would have to have a reporter present at the deliberations of the jury, so to speak. The Army wanted him to vote in closed session.

Well, that did not seem workable to me or to Mr. Kenney, so on the question of the law officers' going back there was a split, and Secretary Forrestal decided with us; that is, with Kenney and me, that we ought not to have him go back.

Now, we do provide here—you see that if the court really wants to do anything more than they have got in the charge, they can come out, and in open court and in the presence of counsel and so forth, just as the judge does in a case when the jury comes out for further instructions, in the case of a civilian court——

Senator SALTONSTALL. Mr. Chairman, I feel—do you want my opinion now?

Senator KEFAUVER. Yes.

Senator SALTONSTALL. My feeling, Mr. Chairman, is simply this: You put that law officer in and have him vote as a juror, I have always felt that in the civilian rule on not having lawyers eligible for members of the jury, that was a good thing, because they get themselves complicated with questions of law. They go off at angles and get away from the facts.

Now, if you have this man going in there, he can argue his case—I mean he can argue with the fellows in there, with the members of the jury, so to speak, and he can influence them; but in the final analysis, if they are men of common sense, they are not going to take his influence if he goes off on some tangent of law that is, perhaps, not sensible.

Therefore, I would agree with the feeling that he should not have a vote.

Senator KEFAUVER. And he shall not retire with the court.

Senator SALTONSTALL. Yes, I would like him to retire.

Professor MORGAN. You would want it on the record?

Senator SALTONSTALL. You mean you would eliminate the retiring of the law officer with the court?

Professor MORGAN. I would not retire him with the court, and if they wanted additional advice, he would come in.

Senator SALTONSTALL. I would rather lean the way that he should not be a member of the jury than contrariwise, and if there is a question of whether he should go in with the jury or not, I would stand by the bill and keep him out.

Senator KEFAUVER. That is my feeling about the matter, so the staff will write the bill in that way.

Now, does there come up in this section, as some of the witnesses contended, that in order to have a law officer for every trial it would be an inordinate, a heavy burden on the service, and that the words "if available" or "if possible to secure one" should be written in?

Professor MORGAN. Well, may I answer that, first? That was the joker in the——

Senator KEFAUVER. In the Elston bill.

Professor MORGAN. In the 1920 bill. That was the Chamberlain bill—maybe you do not remember, but I was concerned with the question at that time, Mr. Chairman, and I had what I wrote at that time quoted to the committee because I was going much farther on this command control than I am now, as a matter of fact.

In the Chamberlain bill they said that he should be a lawyer, if available. He never was available.

Senator KEFAUVER. Was that because they did not supply enough lawyers?

Professor MORGAN. No; during the war they had flocks of lawyers, but they did not want them, the commanding officers did not want lawyers on the court. He was afraid, to use their language, that they would "bitch up" the thing by telling them some law.

Mr. LARKIN. I might clarify that a little, Senator. "If available" as used in the Chamberlain bill, and as it is in the law since 1920, and as reincorporated by the Elston bill of last year, has been construed to mean that a lawyer was not available even though a lawyer happened to be sitting as a member of the court even though he was the only lawyer on the premises. "If available" was held to mean that he was not available to defend the accused, having previously been appointed to the court. This was something which struck the committee as a very broad manner of construing the language.

Senator KEFAUVER. We may meet objection to this provision stated; I think that something over a thousand lawyers are going to be necessary for the services. Is there any compromise or any language that you could suggest?

Professor MORGAN. Not so far as I am concerned. I think this is the key: There are two things that I think are the key to reform here in this court-martial business, and I do not think you are going to get it without that, and, the first thing is for lawyers to conduct the trial and to preside at the trial, and the civilian review board at the top.

I think anybody who has gone over record after record of courts-martial trials would not be able to help feeling—cannot help feeling—that way.

Just as soon as you say "if available", you have got to make that within the discretion of the commanding officer.

Mr. LARKIN. I think, Senator, to answer your question, the mandatory nature of the provision will, of necessity, require a large additional amount of officers running between 800 and a thousand. There is no question about that, and that is about the one and only additional expense that is found in this whole system, as compared to the present systems. I mean it carries practically no other fiscal——

Senator KEFAUVER. Plus the expense of the court of appeals.

Mr. LARKIN. Well, I think that is right, but that is offset in this fashion by the fact that the Army and the Air Force now have a new internal court of appeals, by virtue of the Elston bill, which they call

a Judicial Council, which requires three general officers on each of those courts.

This bill, of course, repeals that internal general officer court. There are six generals now——

Professor MORGAN. And there will be nine.

Mr. LARKIN. Who are doing appellate work, and if you unify the Navy and put three admirals on a similar court, you would have nine general officers.

Senator KEFAUVER. Just a minute. You are going to have a law officer, you are going to have a defense counsel, and you are going to have a lawyer presenting the case.

Professor MORGAN. Yes, sir; but I do not see how you are going to have a decent trial otherwise, notwithstanding all that Colonel Weiner has said.

Senator SALTONSTALL. Migh I put a question in here? I am not sure that it is appropriate, but you recall that the Judge Advocate General—if that is the correct title—came to see me, and he said that if there is some provision in this bill requiring lawyers, if it was carried through, it would just disrupt the Navy; that they have not got the lawyers.

Mr. GALUSHA. They have a bill to take care of that, Senator, and the Navy JAG is referring to section 13 of this bill.

Senator KEFAUVER. He does not want a legal corps; is that it?

Mr. LARKIN. That is one, and there is another one, I think, Senator.

Professor MORGAN. It is section 13.

Mr. LARKIN. The House put in the bill in lieu of a corps, a section 13 of the bill which sets up qualifications for the Judge Advocate General himself.

Senator SALTONSTALL. That is it.

Mr. LARKIN. That is it.

Senator KEFAUVER. I think that must be changed, too.

Mr. LARKIN. And Admiral Russell feels it is too restrictive.

Professor MORGAN. That is the section.

Mr. LARKIN. He feels that the qualifications are so difficult that the Navy will not be able to find the man who qualifies.

Senator SALTONSTALL. That is right, that is the provision he brought up, and it seemed reasonable.

Senator KEFAUVER. That is right.

Mr. LARKIN. We will get to that, I think, in discussing section 13.

Mr. GALUSHA. We will get to that another time, sir.

Senator KEFAUVER. Senator Saltonstall, do you agree that the "if possible" or "if available" should not be placed in the bill?

Senator SALTONSTALL. In other words, leave it as straight lawyers? I think, Mr. Chairman, I would rather try it that way, and if it is not sound and found to be impracticable we can always amend it downhill.

Mr. LARKIN. May I point out this last one thing: The extra lawyers, of course, are a peacetime need. In wartime there is no problem and everybody conceded that, because they have so many lawyers in the services, many of whom, of course, were not doing legal work, but there is such a vast number that the problem would not be nearly as acute, you see.

Senator SALTONSTALL. Does that meet with your approval?

Senator KEFAUVER. Yes; that is all right. Then, the staff will so put it in.

Professor MORGAN. May I call attention, Senator, to the fact that the committee was unanimous on this problem; there was no question about it. All three services stated that they wanted it.

Mr. LARKIN. Yes.

Senator KEFAUVER. The next controversial subject is the board of review and Court of Military Appeals.

Professor MORGAN. Yes.

Senator KEFAUVER. The board of review.

Professor MORGAN. The first thing I understand on that, Senator, is that they do not want the board of review to handle sentences, is that right?

Mr. GALUSHA. That is right.

Senator KEFAUVER. That is right.

Professor MORGAN. That is one of the places where there has been the tremendous criticism of the Army, Navy, and Air Force. Of course, the Air Force was with the Army before, but that is the place where you always had the complaint.

It was in the First World War, as a matter of fact, and I happened to sit for 6 weeks as chairman of the clemency committee, and I know we remitted 18,000 years in 6 weeks. The sentences are just fantastic at times.

Senator SALTONSTALL. Mr. Chairman, I do not want to make hasty decisions, but if you feel the same way, I would say very clearly that I believe they should have the right to reduce sentences.

Senator KEFAUVER. I think undoubtedly it should be there. We will check that as satisfactory, and we will pass on to the next item. That is article 66?

Mr. LARKIN. Yes.

Senator KEFAUVER. The board of review.

Professor MORGAN. Yes.

Senator KEFAUVER. And we will pass on to 67, the Court of Military Appeals.

Professor MORGAN. The Court of Military Appeals; yes.

Senator SALTONSTALL. That is the civilian court.

Professor MORGAN. That is the civilian court.

Senator KEFAUVER. There are several suggestions made about that. In the first place there has been a suggestion that they are going to have a court composed of "lame ducks," and that there should be a requirement that they should have had experience in military justice, and that sort of thing.

Professor MORGAN. Well, I ask you, after you saw Colonel Weiner here, he is a civilian, would you like to have him on a court of military appeals?

(Discussion off the record.)

Senator SALTONSTALL. Mr. Chairman, I would say that if we are working for a decision, if you do not agree with me, we can discuss it; we discussed it a little before you came in, and my feeling would be to establish this civilian court, but not give them life tenure on good behavior, but make it for a period of years, perhaps starting the thing off with 3, 5, and 7 years, so that they would not come into a presidential year; try to work it out that way, anyway.

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Senator KEFAUVER. Yes; I have thought about that a good deal, too.

Senator SALTONSTALL. I think we have got to gamble that the President is going to appoint good men. That is always a gamble and there will be some good and some bad.

As I understand it, it is a court of law; it is the court which will try legal questions.

Professor MORGAN. Absolutely.

Senator SALTONSTALL. With no questions on sentences?

Professor MORGAN. No questions of fact; it is law.

Mr. LARKIN. No sentences.

Senator SALTONSTALL. My vote would be in favor of it.

Senator KEFAUVER. In favor of no requirement of having had military justice experience?

Senator SALTONSTALL. It would leave it wide open.

Professor MORGAN. Leave it wide open.

Senator SALTONSTALL. For the President, but make it for a term of years.

Senator KEFAUVER. Suppose we say 3, 5, and 7 years; then the term after that, for how long?

Senator SALTONSTALL. It would be 7 years or 9 years. I think that is debatable. What is it in New York?

Mr. LARKIN. New York is straight 14 years.

Senator SALTONSTALL. Fourteen? That is too long.

Senator KEFAUVER. I have thought that your suggestion that you made earlier and on which I had not expressed myself, but we want to see how this court is going to operate and what kind of personnel we are going to get, and it may be that experience will show that we should have a man with military experience.

Professor MORGAN. It might.

Senator KEFAUVER. If the first term should be 3, 5, and 7 years, although I had really thought about 2, 4, and 6, but probably we might have difficulty in getting good men.

Professor MORGAN. Would you not get the danger of their coinciding with presidential elections?

Senator KEFAUVER. Well, supposing they are appointed now; would they coincide?

Professor MORGAN. I do not know.

Senator KEFAUVER. If you appointed one for 3 years, would he not coincide?

Mr. LARKIN. The way we originally provided it, Senator, was that the whole code becomes effective 1 year after passage, or 1 year after approval. Assuming that it went through this session and it was approved at the end of June, it would become effective June 1950.

But the House changed the effective date of this court. They felt that the President ought to be able to set it up some time prior to the effective date of the rest of the code, so that they could study the code themselves, and so that they could organize their court procedures, and set up their tribunal.

Senator KEFAUVER. Now, assuming the bill is passed, say it is finally signed the last of June, just say for the sake of hypothesis, when does the court come into operation?

Mr. LARKIN. The court, according to the version before you, S. 857, comes into effect a year from that date, as does the rest of it.

According to the House version, the rest of it comes into effect a year from date, but the court can come into being at any time from passage at the will of the President. In other words, they assumed that maybe 3 months before the rest of it comes into effect the President might start organizing the court, and appointing the people, and that it could be confirmed by the Senate.

Senator KEFAUVER. Well, if we said 3 years, it would put it right in the middle of a presidential year.

Mr. LARKIN. If you went back and had the court become effective not sooner than 3 months before the rest of the code, that would bring you to about next March. It would be March of 1950, and if the first was a 3-year term, that man's term would be up in March of 1953.

Now, you have your next election in 1952, so a 3-year minimum for the first member would bring him just a year beyond this election, and then the 5 and 7, why, I think would scatter pretty well.

Senator SALTONSTALL. 1955 and 1957.

Mr. LARKIN. Yes; they would miss presidential years in each case.

Senator KEFAUVER. All right. Do you have any objection?

Professor MORGAN. I have not any objection to whatever term you fix, just so the thing is not made a football of politics. I am just as anxious as you are, Senator, that they shall not have a lot of lame ducks running around here.

Senator KEFAUVER. Unless they are good lame ducks. [Laughter.]

Senator SALTONSTALL. If you made it an 8-year term after 1957, you would have them falling in just after presidential elections.

Professor MORGAN. That would be too bad if you had them falling in after the presidential election.

Senator KEFAUVER. He is talking about March.

Senator SALTONSTALL. I was trying to work it so that they would be lame ducks, all right, but suppose in 1953, there is an election in 1952—1956 and 1960 are election years—now, you have got here 1953, 1955, and 1957, and if you made it 8 years from 1957, you would have it in 1965, and then you would run into it again, then it would be 1973, 1981, and you would always have it in the odd years.

Professor MORGAN. That is what we ought to have.

Senator KEFAUVER. Suppose we instruct the staff either to make it 3, 5 and 7, or 8 or 9 years. I think this is going to depend upon the effective date that we put it into operation.

Mr. LARKIN. Yes; I think so.

Senator KEFAUVER. And we will agree on that principle.

Mr. LARKIN. We will try to work that out.

Senator KEFAUVER. Now, is there anything else about the court? We have given them the benefits of the judges of the United States court of appeals.

Professor MORGAN. If you are going to get good men you have really got to get them on that basis.

Senator KEFAUVER. If you elect them for terms, can they get the benefits?

Professor MORGAN. I do not know about that.

Senator KEFAUVER. What about the retirement features?

Professor MORGAN. If you elect them for a term they could not get the pensions, and so forth; they could not retire on the full pay or whatever it is.

Senator KEFAUVER. The judges of the Canal Zone, Hawaii, and what not, are named for terms of years. What happens in connection with that?

Professor MORGAN. I do not know.

Senator KEFAUVER. Can you answer that, Mr. Simms?

Mr. SIMMS. I cannot answer that.

Senator KEFAUVER. Suppose we look into that, and at least accord them the same treatment that these other judges are accorded.

Senator SALTONSTALL. That brings up the question of reappointment. I think they ought to be eligible probably for reappointment.

Senator KEFAUVER. I think so. I hope we would get men who would be reappointed.

Professor MORGAN. Yes.

Senator KEFAUVER. All right, sir.

Mr. SIMMS. Mr. Chairman, you have the same question with respect to judges of the Tax Court at the present time. They are appointed for 12-year terms.

Senator KEFAUVER. Look into that matter, and see what we can do with the retirement benefits, and what not.

Professor MORGAN. You see, that is the part the committee left open. You will remember that, Senator. We knew that the terms and emoluments would have to be fixed, but we did want them to be on the same basis for salary and so forth as the circuit court of appeals judges.

Senator KEFAUVER. Then lines 11, 12, 13, and 14 of page 56 will have to be reworked.

Professor MORGAN. Yes, sir; that is of the House bill.

Mr. LARKIN. That is right. We take out "during good behavior."

Senator KEFAUVER. The matter of allowances and retirement benefits and "good behavior."

Mr. SIMMS. May I ask you one or two questions about this, Mr. Chairman, so that we can get it straightened out now?

Senator KEFAUVER. Yes.

Mr. SIMMS. As I understand it, you want 3-, 5-, and 7-year terms?

Senator KEFAUVER. If after we fix the effective date of the act, that is not going to run it into the middle of a Presidential campaign.

Mr. SIMMS. Yes; 3-, 5-, and 7-year terms, followed by 8-year terms?

Senator KEFAUVER. Eight or nine years.

Mr. SIMMS. Yes.

Now, do you want to provide that a person appointed to fill the unexpired portion of the term shall not be appointed for 8 years, but only for the unexpired portion? I think that is necessary so that we keep this system of having one vacancy coming up every several years.

Senator KEFAUVER. Is the staggering idea all right?

Professor MORGAN. I think it is all right.

Senator KEFAUVER. In other words, when the 3-year term expires, we can have that man appointed, and within 8 or 9 years, when the next man's term expires, the appointment will be for 8 or 9 years, instead of all having them come in at the same time.

Mr. SIMMS. What I have in mind is after you get to the 8-year system, let us say, you have reached a point where everybody is appointed for 8 years, and a man is appointed for 8 years and serves 4 years and then dies. His successor should be appointed for only 4 years, should he not, so that we maintain the staggered system?

Senator KEFAUVER. That is right. I did not understand your point.

Professor MORGAN. Yes.

Senator KEFAUVER. That is the way I think it should be, do you not think so, Senator?

Senator SALTONSTALL. Oh, certainly.

Senator KEFAUVER. Well, the next item is a separate Judge Advocate General Corps.

Professor MORGAN. Single Judge Advocate General Corps.

Senator SALTONSTALL. Is this not a proper time to discuss what the Navy——

Mr. LARKIN. In conjunction with this, yes, Senator.

Professor MORGAN. The separate corps.

Senator SALTONSTALL. You have got a separate corps in the Army and not a separate corps in neither the Air Force nor the Navy.

Professor MORGAN. That is right.

Senator SALTONSTALL. And your judgment is to leave it as is for the time being?

Professor MORGAN. Yes.

Mr. LARKIN. We did not attempt to repeal the separate corps for the Army. It was put in last year for the first time, and we did not go forward and provide one for the other two services, and felt that, in the first place, the question of the corps was not within the terms of reference of the committee. The committee felt that having drafted this whole code on a comprehensive and balanced basis, that it was a complete system in itself, it could operate with or without a corps, and the recommendation was that, since the benefits of the corps idea are speculative, they have only been in operation since February 1 for the Army, and it is too early to tell whether it is going to result in an improvement in military justice or not, that you ought to wait and get several years' experience with the operation of the corps under this code in the Army; and if it turns out to be an element in Army justice that makes it superior to the Navy and Air Force justice under the same code, why, then, on that basis, you should probably go forward and provide one for the Navy and the Air Force.

If it does not, why then, you could consider deleting it for the Army.

The services themselves all oppose the corps idea. Certain Members of the House who were the instigators, probably of the corps idea last year, notably Mr. Elston, for instance, who was the chairman of the committee last year, felt that waiting several years and getting experience or observing how the Army corps works, is a sensible idea, even though he generally is a strong proponent of the corps, and he was content to go forward with that, and the bill passed the House without reference to the corps, one way or the other.

Senator SALTONSTALL. Mr. Chairman, my motion would be to leave it as is; in other words, the Army would have a separate corps, and the Navy and the Air Force would not, and we would go ahead and get more experience.

Mr. LARKIN. Yes.

Senator KEFAUVER. How is the Army corps working?

Professor MORGAN. I do not know.

Mr. LARKIN. It is hard to say.

Professor MORGAN. There are several advantages that they think of, and one is that you are going to attract better men, but that remains

to be seen; and then the question of the elimination of command influence, that remains to be seen also.

Senator KEFAUVER. I think there is a good deal of logic in the Navy's viewpoint that it is a pretty good idea for a lawyer to do something else once in awhile.

Senator SALTONSTALL. He has got to go to sea.

Professor MORGAN. He has got to go to sea, yes.

Senator KEFAUVER. To get experience.

Mr. LARKIN. Lawyers, they feel, by virtue of their training, make good administrators and good executives, and they feel that they will get a more efficient use of the man's talents by having him do some of those other jobs occasionally, rather than just only do law work, and confine himself to that and nothing else, and that brings up the consideration, Senator, which was collateral to this, of section 13.

Mr. Elston and the other Members of the House who, as I say, are strong proponents of the corps idea, were nevertheless satisfied that it was sensible to postpone judgment on it, but they felt as an interim measure in so postponing it, that they ought to provide that the Judge Advocate General himself be peculiarly and specially qualified in the manner set forth in section 13 here.

Senator KEFAUVER. Which they made too restrictive.

Mr. LARKIN. That is the point now. I think all the services agree that extra qualifications for the Judge Advocate General himself are advisable and sensible, but the Judge Advocate of the Navy feels that the qualifications here are just too restrictive; they go beyond what they should do.

I am sure he does not object to the qualification that he be a lawyer, and that he have a certain amount of experience.

Senator KEFAUVER. Mr. Larkin, is not the provision for a separate corps wasteful of men?

Professor MORGAN. It may be, you cannot tell.

Mr. LARKIN. It may be, Senator, and that is just the point. The services feel it is because they feel it segregates out in an isolated block from the rest of their operations this one group of people who do nothing else, and they do not get any further use from them.

They feel that the field of law is not quite in the same category as, for instance, chaplains and medical officers, who, frankly, do not do anything else and are not expected to, and have no training which would enable them to do anything else in the service, whereas lawyers do have such training.

Senator KEFAUVER. Who is particularly for a separate corps, I mean, outside of Mr. Elston?

Mr. LARKIN. Well, I think the bar associations feel, in general, that it is a good thing. The way they feel, curiously enough, is that the corps enables you to split out the lawyers from command in that the Judge Advocate General and all the people in the corps, are then free of the Chief of Staff or the Chief of Naval Operations, if you will, or the Air Chief of Staff. That is the concept of control that they are talking about. They are not talking about control of the commander in the field; they are talking about the position of the Judge Advocate himself vis-à-vis the Chief of Staff and, of course, there again the Navy points out that their Judge Advocate, by virtue of Navy organization, is not under the Chief of Naval Operations at all. He is

directly responsible to the Secretary, and he is on a par or on a line with bureau chiefs and the Chief of Naval Operations, and not under him.

They do not have that general staff organization that the Army has.

Senator KEFAUVER. Well, this is supposed to be a unifying bill, and is not this the only divergence in the set-up?

Mr. LARKIN. I think that is so, but this ought to be borne in mind in connection with it: The corps is an organizational device, and it was provided for the Army by virtue of an amendment to the National Defense Act, which is the Army's organic law for its own operations and its own organization, and it was not provided as an amendment to the Articles of War at all.

It is this outside organizational act that covers the Army's operations, and as such, was an organizational change for the Army.

However, to the extent that the Navy does not have that organizational provision, why, it is perfectly true that there is that difference that exists between them.

Senator SALTONSTALL. Furthermore, Mr. Chairman, the Army is twice as big as the Air Force and twice as big as the Navy numerically, so there is more reason for having a separate corps in the Army than there is for either the Air Force or the Navy.

Mr. LARKIN. Well, I should think that in the last analysis, if it is a good thing, it is good for all; if it does not add anything, it is superfluous for all.

Senator SALTONSTALL. I meant that is an argument for a differentiation.

Mr. LARKIN. Well, that may be, but it does require a great deal of organizational changes in the other services and the benefits from it, from our viewpoint, are still so speculative—we did not attempt to repeal it; we did not attempt to say to Congress "You put it in last year, we do not think it is any good," because we still do not know.

Senator KEFAUVER. What did General Green say about the corps?

Mr. LARKIN. I do not think he mentioned it particularly. I think he personally favors it. The Army, of course, as you recall last year, in the persons of General Eisenhower, Secretary Patterson, Royall, General Lawton Collins, all opposed it very vigorously. I think General Green's personal view is that it is a good thing.

Professor MORGAN. The rest of the Army do not like it. Of course, with the set-up, you can see the set-up under the Elston bill, General Green would be bound to like it. He gets a major generalship.

Senator KEFAUVER. Are we having a lot of fellows who ought to be doing something else part of their time who, by virtue of the fact that they are lawyers——

Professor MORGAN. He is stuck right there.

Mr. LARKIN. I think we will find that out, Senator, and I think one of the ways we will find that out is this: Article 67 covering the court of military appeals provides in addition to that court's duties of reviewing cases, will once a year sit down with the three judge advocates and appraise the operations of the military justice systems of the three departments; will provide statistics on pending cases, and will report to this committee each year, in addition to reporting to the Secretary of Defense and the Secretaries of the Departments. So that I think those three civilian judges and the three Judge Advocates

studying the operation of the code and the corps and writing a report, and sending that report to you, will be the best way of finding out whether it is working, whether it is beneficial, whether time is being wasted, and all the other facts concerning it.

Senator KEFAUVER. Supposing we abolish the Army corps, is there any reason why administratively they could not concentrate these fellows for the use of the service?

Professor MORGAN. They have got along with it before just the same way.

Mr. LARKIN. They were reasonably concentrated, in that the Army has had a Judge Advocate Department, and they did specialize within it.

Professor MORGAN. Back in World War I, Senator, you know there were a lot of us greenhorns from the sticks in it, and then they had some men who had been in the Regular Army who were put over there, and those are Ansell, and Weeks, and a lot of West Pointers were there, but it was just as separate a department as a corps is for that particular purpose because we had to have men and had to have men who knew the law for that.

Of course, the Judge Advocate General of the Army, as you probably know, was the general counsel's office for the whole Army. We had as big an organization for nonmilitary justice cases as we did for the military justice cases.

Mr. LARKIN. Of course, the Navy claims that its legal specialist idea is superior to the corps in that the men get this separate title, and they do this legal work all the time, and they are kept out of command for that reason. They do not become commanders themselves, but it enables them, nevertheless, to assign them to other duties.

Professor MORGAN. I talked with a young chap who was a lawyer, and he said, "Well, I would not want to go into the Navy Judge Advocate General part unless I knew I could be assigned to sea duty at times."

He said that was the feeling of almost every young fellow in the Navy, and that was the idea and feeling that every young fellow in the service had.

Senator KEFAUVER. I certainly think that if we are trying to unify the code of military justice, that this separate thing is a good idea to the extent that the Army can set up a separate Judge Advocate General Department.

Mr. LARKIN. They have done it already, and they have always had——

Senator KEFAUVER. And without having, by law, to provide the legal corps. I do not have any particularly strong feeling about it.

Senator SALTONSTALL. My feeling would be to let the thing ride. The House did not consider it, and if the thing became an issue on the Senate floor, why, we would leave ourselves open to judgment, so to speak, not to take too strong a position.

Senator KEFAUVER. You mean, to let it ride as it is in the bill?

Senator SALTONSTALL. Yes.

Mr. LARKIN. The bill makes no provision for it at all.

Senator SALTONSTALL. The Army has a separate one, and the Navy and the Air Force have not

Professor MORGAN. The bill does not touch it.

Mr. LARKIN. We neither repeal it nor add it; we transmitted the problem.

Senator KEFAUVER. Just let it go as is.

Now, a single Judge Advocate General.

Professor MORGAN. Well, that, of course, is very nice theoretically, after you once get the thing thoroughly unified, but there again we felt that we had to keep off that because of the different organizations of the Judge Advocate General's Office.

For example, if you had a single Judge Advocate General, what should he be, an Army man, an Air Force man, a Navy man, or a civilian? That is the first question.

Second, the functions of the Judge Advocate General are so different in the different services, if you had a single Judge Advocate General, how and what functions would you take away from him? In the Army for example, he is a——

Senator KEFAUVER. I am inclined to let it go as is.

Senator SALTONSTALL. There is no question in my mind.

Senator KEFAUVER. We do not mean to cut you off, Dr. Morgan, but when we are unanimous——

Professor MORGAN. I will not argue with you.

Senator KEFAUVER. Six seems to be qualifications of counsel before general courts martial.

Professor MORGAN. That is the same question you discussed a few minutes ago, Senator, whether we have to have lawyers; whether they have to be lawyers.

Senator KEFAUVER. Now, it has been suggested that we could probably save some lawyers if you provide that the defense counsel must be a lawyer, but that in a good many cases that is an unnecessary burden to put upon the service—to require that the prosecution counsel be a lawyer.

Professor MORGAN. Do you think that the services would get a fair show then?

Senator KEFAUVER. Well, the service, if they felt that was required for them to get a fair show, would be very sure to have one, but in other cases, as to whether a fellow was a. w. o. l. or what not, the evidence could be quite as well presented by somebody else.

Professor MORGAN. I personally, of course, do not worry much about that, but I do think that if you are going to have a decent record of the trial, and I do not care what the case is, a. w. o. l., desertion, or whatever it is, if it is being tried by a general court, it ought to be tried competently, and if you go over some of the records that I have gone over, it is perfectly obvious that it is not tried competently and, certainly, if you had a good lawyer on one side and the kind of layman that you are likely to get on the other sire, the record might not reflect the facts.

Senator KEFAUVER. General Green and Harmon, and Colonel Weiner, speaking for themselves——

Professor MORGAN. I know he does.

(Discussion off the record.)

Senator KEFAUVER. You have won your point. We agree with you.

Senator SALTONSTALL. I keep harking back, should there be some change in this bill about the qualifications for the Navy? Is this the point to bring that up?

Professor MORGAN. Oh, yes; this applies to the Navy as well.

Senator KEFAUVER. We are talking about the Navy Judge Advocate General?

Mr. LARKIN. The Judge Advocate General himself.

Senator SALTONSTALL. The qualifications.

Professor MORGAN. You mean the Judge Advocate General himself.

Senator KEFAUVER. Suppose we take that up. What section is that?

Mr. LARKIN. It is section 13.

Professor MORGAN. Senator Saltonstall, I think the only thing that the admiral was concerned about was this: If you required the 3 years' continuous service immediately before the selection of the Judge Advocate General, there would be so few men in the service—they have plenty of men who have 8 years' service, but they have been on stretches of 2 years instead of 3.

(Discussion off the record.)

Mr. LARKIN. That qualification, if that qualification is kept in, the law specialist, it would then mean that at least before the judge advocate is qualified, and it might be the day before, he would have to become a law specialist.

Senator KEFAUVER. "Shall be judge advocates"——

Mr. LARKIN. Judge advocate is for the Army and the Air Force, and law specialists for the Navy.

In the case of Admiral Russell, he is a line officer; in the case of Admiral Colclough, he was a line officer, and if this had been in effect they would have been, at least the day before they were appointed required to become law specialists, which they could have done, and which would have taken place.

Senator KEFAUVER. Suppose we delete that clause and say, "shall have at least 8 years' cumulative experience in a Judge Advocate General's corps, department, or office"?

Senator SALTONSTALL. Mr. Chairman, may I make a suggestion?

Senator KEFAUVER. Yes.

Senator SALTONSTALL. My suggestion is that Mr. Galusha get hold of the Navy Judge Advocate General and ask him to come to see him and let him give him his definition—ask him to write this clause, and then go over it with Mr. Galusha, and I would take your opinion, Mr. Galusha. I would give you my proxy, so to speak, to put in the bill what you and he worked out as fair.

Mr. GALUSHA. Senator, I have talked with Admiral Russell relative to this section.

Senator KEFAUVER. I have discussed this with him, too.

Mr. GALUSHA. I believe Admiral Russell proposes that section 13 be deleted entirely, and that S. 1824, recently introduced at the request of the Navy Department, will take care of this section, although I am not familiar with all the provisions of this new bill.

Senator SALTONSTALL. Would it not be a good plan to follow my thought, and you and he come together——

Senator KEFAUVER. Mr. Galusha, as far as I am concerned, I am not in favor of amending our bill on the assumption that some other bill is going to pass.

Senator SALTONSTALL. Written into this bill.

Senator KEFAUVER. Suppose you get language that will be satisfactory to him, and let us get together.

Mr. LARKIN. I think that is a good idea, because if you modify this, I think you can reasonably work it out with the House; if you were to delete it completely, I am sure you would have conference.

Senator KEFAUVER. I understand Mr. Elston——

Mr. LARKIN. Yes, he is taking this in lieu of the corps at this time, and he is satisfied with having the corps postponed for several years pending experience if this or something akin to it is in it.

I think your suggestion is a splendid one. We can clean it up.

Another suggestion I would make is that we might consider, after this is amended and, perhaps, made less restrictive, making this section effective 3 or 5 years from date, to give the Navy an opportunity to build up a number of men who could get this kind of experience, who have not that experience now.

Senator KEFAUVER. Well, the last clause of the sentence is the one that they particularly object to.

Mr. LARKIN. That is the one they particularly object to.

Senator KEFAUVER. Because they go on sea duty every so often.

Mr. LARKIN. You could strike that and, perhaps, make it effective——

Senator KEFAUVER. Anyway, let us work it out and get language that is satisfactory.

Mr. LARKIN. That disposes of that.

Professor MORGAN. That would be fine.

Senator KEFAUVER. Now, we have No. 7, double jeopardy. Just point up the issues in respect to that controversy.

Professor MORGAN. Well, the point that we have to take care of, Senator, is the automatic appeal, you see.

Suppose you use the double jeopardy clause that is ordinarily used, that no one shall be put twice in jeopardy for the same offense; that is the way it is ordinarily used. Here he is said to come under the principle that he shall not be tried twice for the same offense, but you save the automatic appeal, and provide that he may be tried only if his conviction, if he has been convicted, and it is set aside, and a new trial ordered, you see, and in the new trial he cannot be stuck for anything he was not found guilty of before.

No sentence for the same offense can be increased on the new trial, and so forth.

Well, now, as you know, Senator, the theory in the civilian courts is that if you apply for a new trial, you waive the double jeopardy clause. We had this case up in the First World War, where there were a group of Negroes all convicted of raping a single white woman, and when the record got to the Judge Advocate General's Office, the record was in such bad shape that you could not find sufficient evidence to convict any single one of them. You could find plenty of evidence to show that there were some of these fellows who were guilty, and the question was could they order a new trial.

Well, the point was made, before this particular case, it was assumed that if you had prejudicial error in the record, the Judge Advocate General would recommend the quashing of the conviction, and it had been ruled that all that the Judge Advocate General could do was to recommend; he could not, or his office could not, really set aside a conviction, you see; so that the question was, Did we have power to order a new trial.

You know, the British never order a new trial in criminal cases, except where there has been no jurisdiction, or where the matter below was not really a trial. If they find prejudicial error in the record in the civilian courts, the conviction is set aside and the prisoner discharged.

Well, that was the theory, of course, on which the military code was drawn at that time.

The way it was solved, Senator, was that the record went down with the statement that those of the defendants who were convicted and desired a new trial, and asked for it, should be retried; if they wanted to be executed without a new trial, it was perfectly all right; but the result was that they all applied for a new trial, and on the new trial about five or six of them were convicted, and the rest of them were set free.

Now, the question we have here is if we do not make a provision of this kind—and granting that the double jeopardy clause of the Constitution applies to the Army, upon which there are decisions both ways, and the Wade case was a case where the Court refused to really decide that question—if we do not do that, then if we change this we ought to provide some statement to the effect that the accused who had been found guilty shall be presumed to have applied for a review and a new trial, unless he definitely waives the matter of record within so many days after the conviction or something of that sort.

Then, you could put it on exactly the same basis as the civilian, and here we think we have protected the accused just as much as you would protect him under that kind of a provision, because our statement of the retrial applies only to the case where he has been found guilty.

Mr. LARKIN. To put the issue another way, Senator: The military double jeopardy differs from the civilian and the constitutional in that double jeopardy obtains or applies or starts, if you will, in many civil jurisdictions, either when the jury is sworn or the first witness is heard, and from then on the man is in jeopardy.

In the military, however, and this has been traditional through its whole life, there is no jeopardy until after the conviction, and it does not obtain, or the man does not get in jeopardy when the first witness is sworn. The reason there is the difference, as Professor Morgan has just pointed out, that the military have always had this automatic appeal, which is given the accused, which is not true in civil life.

The appeal is always on his petition. He asks for it, and in effect thereby waives jeopardy, because when he asks for it, and the court reverses and sends it back for a new trial, then he cannot say, "Well, you put me in jeopardy the next time." He has waived it by asking for it. Military personnel always get the benefit of an appeal automatically, and that is why there has been that difference.

Now, General Riter, and Senator McCarran's letter stated that they felt double jeopardy ought to apply in the military exactly the same way as it applies in the civil courts, at the very beginning of the trial, and they stand for having the same application of the constitutional double jeopardy provision.

Senator KEFAUVER. In other words, in order to do that, then, it would be necessary to deny an appeal.

Mr. LARKIN. An automatic appeal.

Senator KEFAUVER. Automatic appeal, unless the accused asked for it.

Mr. LARKIN. That is exactly the point.

Professor MORGAN. I should like very much—I do not know what the Supreme Court would have held in the Wade case, now, Senator, if they had not found the "imperious necessity" in that case.

Senator KEFAUVER. That is the one where they chased the fellow all over Europe to try him?

Professor MORGAN. That is right; where they sent him back.

Senator KEFAUVER. He was caught and sent back.

Professor MORGAN. In order to get more evidence, and so forth. I was astonished that the defendant's counsel conceded that after the court was closed in that particular case—the court was closed, they asked each side whether they wanted to put in any more evidence, and the judge advocate asked the court if it wanted any more evidence, and they said "No," and then when they got back there, and got into a consideration of the evidence, they came out and said that they wanted the case postponed, and for the Judge Advocate General to get these other witnesses.

Senator KEFAUVER. Well now, suppose you give us your views.

Professor MORGAN. That would have been impossible in a civilian court, and I think it ought to be impossible.

Senator KEFAUVER. Is it impossible under our language?

Professor MORGAN. No, that is not; it is not. I have to agree that it is not, because we say "shall not be tried twice."

Senator KEFAUVER. I think we ought to protect the accused from this. If they go to trial, and then the prosecuting attorney finds that he probably did not have as good a case as he thought he had, and he gets the case postponed, or deferred, or something or other, or whatnot, I think double jeopardy ought to apply.

Professor MORGAN. I agree with you absolutely. I think he has got to shoot his bolt all at once. I do not think he has got——

Senator KEFAUVER. What can we put in this bill to provide that?

Professor MORGAN. My point would be simply that you use the constitutional statement that he shall not be put in jeopardy twice for the same offense, but that you save the automatic review, by providing that in case he is found guilty, he shall be deemed to have applied for review, and a new trial under the provisions of this code, unless within a certain number of days he specifically says that he waives the review, and does not want it.

Senator SALTONSTALL. Under what conditions would he waive a review, because he was satisfied with the sentence?

Professor MORGAN. He practically would never do it, as a matter of fact, because we have got him protected here. He cannot be stuck any worse than he was on the new trial. The sentence could not be increased. It is all to the good for him, so that he will never waive it, as a matter of fact, and I suppose——

Senator KEFAUVER. The only objection I see to your suggestion is the exigencies of war, where the general court might have to break up if they were in active combat.

Professor MORGAN. Well, that is all right, but suppose it does have to break up? The court here in the Wade case assumed that if there was "imperious necessity" it could break up just the same way as the civil court.

Senator KEFAUVER. Would you need to write that in?

Professor MORGAN. That was not the fault of the prosecution. The battlefront was moving, and they said that would apply in the military case, just the same as in the civilian court if a juryman becomes ill or if they discover afterwards that you have got a disqualified juryman on the jury, or something of that sort, or there is misconduct of counsel or anything of the kind, in which case the court can order a mistrial.

Senator KEFAUVER. Are you in agreement with Professor Morgan on his sentiments, Mr. Larkin?

Mr. LARKIN. I think it is six of one and half-a-dozen of the other if we do it that way. You certainly have to provide for the preservation of the automatic trial in the form of a petition of some kind which does involve, of course, a redrafting of a lot of our appellate system.

Professor MORGAN. You will not have to redraft anything but this.

Mr. HAYDOCK. May I make one suggestion there? The Navy has a provision which stops just exactly what Senator Kefauver wants to stop. It says that if the prosecution, for any reason nolle prosses the case because they do not think they are going to be able to convict the man, then that is jeopardy. Now, we can cover it by that one simple sentence. We could add that sentence.

Professor MORGAN. Yes, you can have that if you want it.

Mr. SIMMS. It does not take care of the Wade case, does it?

Mr. LARKIN. No.

Mr. SIMMS. It was not broken up.

Senator KEFAUVER. They just moved back.

Mr. LARKIN. The Wade case is taken care of by the doctrine of "imperious necessity."

Professor MORGAN. In the Wade case they said they discharged the court and had a new court appointed.

Mr. SIMMS. I understand.

Professor MORGAN. Now, the defendant insisted that if they had the same court he would not have objected. That was the concession that was made, that that was the regular Army practice, and had been. Well, you know, Senator, that during World War I they sent back acquittals for reconsideration.

Senator KEFAUVER. I know.

Professor MORGAN. Yes, so that this provision here did not protect a man against a finding of not guilty.

Senator KEFAUVER. Does that now——

Mr. LARKIN. We have another provision.

Professor MORGAN. We have got that hole plugged.

Senator KEFAUVER. Where?

Professor MORGAN. On what can be done. That was plugged in 1920 and, as a matter of fact, as soon as Ansell began his crusade about the thing, they put an Army regulation into effect that it could not be done.

Senator SALTONSTALL. Mr. Chairman, I am not quite sure that I understand or have a complete understanding of this, but one thing sticks in my mind, and that is that if you use the words that you are suggesting, why are you not going to have automatically two trials in every case and have all the trouble attendant on two trials?

Professor MORGAN. No, he just applies for a new trial under the provisions of the code, that is, he is deemed to have asked for the review that he now gets automatically.

Senator SALTONSTALL. So, you are merely leaving it as it is, only you are covering a technical constitutional provision.

Professor MORGAN. That is it. I am just using the double jeopardy statement, just as it is in the Constitution, that is. You say that he shall not twice be put in jeopardy for the same offense. You use that, and then you provide for the automatic review, saving that, by saying that he shall be deemed to have applied for an automatic review, and a new trial unless he indicates the contrary.

Senator SALTONSTALL. Supposing a man like Senator McCarran, who is interested in this subject, gets up and says that this is double jeopardy because you are presuming him to do something.

Professor MORGAN. I think you get away from that. He can refuse it if he wants to. It is totally for his benefit.

Senator KEFAUVER. The sentence cannot be increased.

Mr. LARKIN. Yes. That is right.

Professor MORGAN. I do not think anybody could say that, because they—Senator McCarran as well as everybody else—wants to preserve this automatic review; that is one place where the military procedure has very great advantages over the civilian procedure. This review does not cost the accused 1 cent.

Senator SALTONSTALL. Mr. Chairman, I would say very frankly that this is awfully technical, and I am not quite sure that I understand it, but I would follow the advice of our experts.

Senator KEFAUVER. Then, Dr. Morgan, would you and Mr. Larkin assist our staff and Mr. Simms in putting in that additional protection in some way or another, and giving us the necessary language?

Professor MORGAN. Whichever way you and the staff think will do it most effectively.

Mr. LARKIN. That is considered, as I think Mr. Haydock points out by keeping the same provision we have, and adding to it the Navy practice, that if the prosecution nol-pros it——

Professor MORGAN. Not nol-pros, dismiss it.

Mr. HAYDOCK. Either one.

Senator KEFAUVER. Be sure and save the protection of the Government though with respect to "imperious necessity."

Mr. LARKIN. Oh, yes.

Professor MORGAN. Yes; that would be saved. That would be just like this except for that, whichever way you do it. I really am just as anxious as you Senators are to have the double jeopardy clause apply, and apply the way it does in civil courts.

Senator KEFAUVER. Well, while we are on that question—I received this from somebody, some suggested provisions, and my administrative assistant talked with this man, and said he seemed to know what he was talking about; he was strongly for this bill, except that he had certain provisions. He suggested that article 15 (F), page 15, line 25, and on page 16 that with respect to a person attached to or embarked in a vessel or confined "on bread and water" could receive that punishment for a period not to exceed five consecutive days.

Senator SALTONSTALL. We talked about that, Mr. Chairman, before you came in, and I think the explanation was a very clear one. This

provision is confined to a ship. It is not on land; it is not on a post, and when you come to a ship, if a man comes back aboard the ship, we will say, drunk or having committed some minor offense, AWOL, or something, they have got no way of punishing him.

If they just leave him in his room, and if he only can read a book, why, he is better off than he is out scrubbing the decks, but if they have some method of putting him on punishment, punishing him by lack of food or putting him on bread and water, on that sort of a diet, they are really making him a little bit uncomfortable for the offense he has committed.

It seems to me that if you leave it to a ship, not have it with respect to a post, on shore, and not have it apply to the Army and Air Corps, it is a perfectly fair provision.

Senator KEFAUVER. As written in the bill it is limited to ships?

Professor MORGAN. As amended.

Mr. GALUSHA. The House amended it.

Professor MORGAN. I will give you the history of this. What we did with respect to article 15 was we took all the company punishment that the Army inflicted, all the company punishment that the Navy inflicted. The Army did not want a lot that the Navy had, and the Navy did not want a lot that the Army had, and so we provided that the Secretary could, by regulation, cut down these particular things.

Senator KEFAUVER. Well, now, article 30 apparently makes it possible for that punishment to exist for 30 days.

Professor MORGAN. But the House committee cut that all out, and as you will see they went back to the minimum of penalties, and on the bread and water they provided that it should apply only to a man who was assigned or attached to a ship.

Mr. LARKIN. That is right.

Senator KEFAUVER. Article 30 apparently makes it possible to have a maximum assignment of bread and water for 30 days.

Mr. LARKIN. Thirty?

Professor MORGAN. No.

Senator KEFAUVER. Off the record.

(Discussion off the record.)

Senator KEFAUVER. I do not like this bread and water.

Professor MORGAN. Neither do I. We did not like it, but the explanation that the Navy gave seems to us to warrant it.

Senator SALTONSTALL. It seems to me that is a very reasonable way, because you have no way of punishing a man on shipboard. If you stick him in a bunk and leave him on there, he is better off than he is polishing brass.

Mr. GALUSHA. The Marine Corps is not in favor of having this punishment confined to shipboard. They would like to have it for use on land as well.

Senator KEFAUVER. Well, it does apparently only apply to enlisted men, too.

Mr. HAYDOCK. The present article 30 is in the articles for the government of the Navy, which we are repealing, but as it is now written in the law they can give 30 days of bread and water.

Mr. LARKIN. That is being repealed.

Senator KEFAUVER. Repealed where?

Mr. LARKIN. Back here it repeals all the articles for the government of the Navy.

Senator KEFAUVER. So 5 days is the maximum that can be provided for?

Mr. LARKIN. That is right.

Professor MORGAN. Five days.

Senator KEFAUVER. I would say cut it down to 3 days or something like that.

Mr. LARKIN. I think, as a matter of fact, Senator, they give a man full rations every third day.

Professor MORGAN. He would certainly never get anything but bread and water for 3 days.

Senator KEFAUVER. I mean, a fellow can live 3 days with bread and water.

Professor MORGAN. We landlubbers——

Senator KEFAUVER. Do you have any objection to cutting it down to 3 days?

Senator SALTONSTALL. No; I would rather leave it for five, if you do not care.

Professor MORGAN. Senator, we landlubbers said it was cruel and unusual punishment, and it ought to be taken away, it ought not to be allowed.

Senator KEFAUVER. Well, it is something you ought to be able to scream about.

Mr. LARKIN. Well, the House did modify it down, so that it could only be imposed by the Navy only on a vessel. The way we had written it the Navy had carte blanche at any place.

Senator KEFAUVER. If Senator Saltonstall does not raise too much objection, let us cut it down to 3 days.

Senator SALTONSTALL. All right.

Senator KEFAUVER. Next are the persons subject to the code. I thought that some of the fellows made rather effective arguments on this matter.

Professor MORGAN. The only part of that, Senator, where we have expanded it that I should feel very strongly about, is this case of Reserve officers on inactive training under orders which state specifically that if they accept it they will be subject to the code, and that is to take care of these fellows who practice flying. When they buzz places, and so forth, and they are in charge of very expensive equipment, they certainly ought not to be allowed to use that very expensive equipment for training unless they are doing it under the terms of orders affecting regular members of the corps. It seems to me that is the case. They do not have to do it if they do not want to. They do not have to accept it.

Senator KEFAUVER. Well, that refers to subsection 3?

Professor MORGAN. Right.

Mr. LARKIN. Yes.

Senator KEFAUVER. Reserve personnel who are voluntarily——

Mr. GALUSHA. This is the way it reads.

Senator KEFAUVER (reading):

> Reserve personnel while they are on inactive-duty training authorized by written orders which are voluntarily accepted by them, which orders specify that they are subject to this code.

Professor MORGAN. That is right.

Mr. GALUSHA. I think, as I recall the testimony on that, Senator, most of the Reserve officers felt that the Regular services are going to

put out orders, all their orders, requiring that they are subject to military law, and in talking with the Regular services, I think it is their intent to use that rather mildly, not to make them subject to court martial every time they go to a training drill, and it is only in those cases where these people are on inactive-duty training, where they are handling expensive equipment, such as Professor Morgan stated, taking up planes, and so forth, that this will affect them.

Professor MORGAN. As a matter of fact, the Army practically said they would not use it at all.

Mr. LARKIN. That is right.

Professor MORGAN. They said they were not going to use it. The Navy said they might use it if the fellow is put in charge of a ship.

Senator KEFAUVER. How can we make this a little more amenable? Does this refer also to National Guard men when they go down——

Professor MORGAN. If they come into the Federal service.

Senator KEFAUVER. No; I mean when they go to their weekly meetings.

Mr. LARKIN. No.

Professor MORGAN. Only when they are in Federal service.

Senator KEFAUVER. Why not?

Mr. GALUSHA. They are not in Federal service.

Senator KEFAUVER. They are, too, if they are "on inactive duty training authorized by written orders."

Professor MORGAN. They never have to take the training if they do not want to.

Senator KEFAUVER. What is this about this that ties them up for 3 years?

Mr. HAYDOCK. That is article 3.

Mr. LARKIN. Well, you can tie it in this way: The history of this, just for a minute again, is that the Army has never had this, and the Navy has had this on the books not in the Articles of Government for the Navy, but in the United States Statute, a provision which is very much broader than this, and the Navy now does have jurisdiction over their Reserve personnel on inactive duty, or inactive duty training, when they are wearing their uniforms, when they are taking correspondence courses, when they are attending these monthly meetings, and almost in every circumstance.

Professor MORGAN. Whenever they have got their uniform on.

Mr. LARKIN. For the record, I would like to read section 855 of 34 United States Code, which is that provision for the Navy. Now, this is a substantial dilution of the Navy's jurisdiction, and in the same breath is granting jurisdiction to the Army that they have never had before. It is the middle ground, if you will, and was intended by the committee to cover——

Senator SALTONSTALL. What is the regulation in the Navy now?

Mr. LARKIN (reading):

> All members of the Naval Reserve who are employed on active duty, authorized training duty with or without pay, drill, or other equivalent instruction or duty, or when employed in authorized travel to or from duty, or appropriate duty, drill, or instruction, or during such time as they may, by law, be required to perform active duty, or while wearing a uniform prescribed for the Naval Reserves, shall be subject to the laws, regulations, and orders for the government of the Navy.

Now, under the provision in question, they are not subject to this code if they are wearing a uniform or if they come to a monthly meeting, or if they are taking a correspondence course at home.

Professor MORGAN. Or parading or something of that sort.

Mr. LARKIN. They are subject here only when they get specific written orders which state in them that they are subject to the code, and they voluntarily accept them and come on for week ends in active duty training, wherein they are using the heavy, expensive equipment.

Senator SALTONSTALL. Read that again.

Mr. LARKIN (reading):

All members of the Navy Reserve when employed on active duty—

and, of course, that is true of everybody all the time, and that is not this—

authorized training duty—

that would be inactive duty—

with or without pay, drill, or other equivalent instruction—

that would be when they take a correspondence course at home—

or duty or when employed in authorized travel to or from such duty or appropriate duty drill or instruction or during such times as they may, by law, be required to perform active duty, or while wearing a uniform prescribed for the Naval Reserves shall be subject * * *

Now, that is extremely broad, as compared to this which cuts down the Navy's jurisdiction.

The Reserves have claimed that this is to be read in as broad a sense as this previous Navy article, and they are apprehensive about it. When I say "Reserves" I mean the Army and Air Force; the Navy Reserves are already subject to the very broad provision I read. The witnesses claim it will deleteriously affect the activity of the Reserves, and that men are not anxious to subject themselves to it, and I say in that connection the Naval Reserve is probably the most active and the best Reserve of any of the armed services, even though they are subject to a much broader jurisdiction than is provided here.

Now, we have tried in the House hearings and in the commentary that we wrote to this bill to make it perfectly clear that the legislative intent of this provision is not to apply when they wear uniforms and when they go to monthly meetings, but it is only to cover the week-end flight duty, and other sea duty on shipboard, when the man has appropriate notice that he is subject to it, when he voluntarily accepts it, and under no other circumstances.

Now, they do not cut orders of that kind, and give them those written orders when they come to those monthly meetings, and when they go to parades.

Senator KEFAUVER. Mr. Larkin, is it possible to put a "provided" after the word "code" to say that the order should only specify that they are subject to the code in these particular circumstances you are talking about?

Mr. LARKIN. I think maybe we could clarify it more, and make it even tighter than it is, so that everybody is completely reassured. Maybe we could put in here that this shall not cover the mere wearing of the uniform, correspondence courses, or perfunctory meetings, or things of that character. Maybe we could do that.

Senator SALTONSTALL. Why is not (6) very broad, "Members of the Fleet Reserve and Fleet Marine Corps Reserve"? There is no qualification there.

Mr. LARKIN. There is none at all. They have always been subject. They are in the nature of retired Regulars, and that is different from these Reserves.

Mr. GALUSHA. That is a different proposition.

Senator KEFAUVER. Let us pass on to the retired personnel, Regular components of the armed forces. It states that the retired personnel who receive pay—that means a fellow on retirement, he is still subject.

Mr. LARKIN. That is right.

Senator SALTONSTALL. General Eisenhower?

Mr. LARKIN. General Eisenhower, Admiral Nimitz, and so forth.

Mr. GALUSHA. That has always been the situation.

Senator KEFAUVER. Well, is that good business? Now, it is brought out in the hearings that if they criticized Congress, if they ran for office and criticized the President, technically they might be subject to courts martial.

Mr. LARKIN. That is right.

Senator KEFAUVER. I think it is a good idea to have these fellows criticize.

Mr. LARKIN. You might cure that, Senator, by just striking out the provision which makes it an offense to so criticize.

Professor MORGAN. We tried to get that stricken out.

Senator KEFAUVER. Who objected to striking it out?

Professor MORGAN. They all said—we got it confined to officers, you know; that is, they said it was not seemly for the officers, the men who were officers of the United States, to be going out and calling public officials what they really are in a great many cases.

Senator SALTONSTALL. The other side of it is that these fellows are receiving regular pay as Army or Navy officers, and are subject to recall to duty.

Now, as long as they are receiving pay from our Government, because of their military service, I think there is a very strong argument that they should be subject to this.

Senator KEFAUVER. Well, it is pay only in the sense of retirement benefits, is it not?

Mr. LARKIN. That is the debatable question. I think there are two schools of thought: One is that it is a pension in the same fashion that anybody else gets a pension, and after he has concluded his service.

Senator KEFAUVER. After we serve here for a certain length of time we can retire with benefits.

Senator SALTONSTALL. Six years. [Laughter.]

Senator KEFAUVER. I certainly want to reserve my right to criticize.

Mr. LARKIN. Then the other school is that they continue to get their pay on retirement based on their conduct, and activity, and their availability while they are in retirement, and they are carried as official officers on the registers of the Army and Navy of the United States; they get commissary privileges; they can wear their uniforms at all times.

Senator SALTONSTALL. That is the way I would construe it.

Mr. LARKIN. That is the way the services construe it.

Senator SALTONSTALL. Nimitz has now been sent over to India; he is ordered over there.

Professor MORGAN. It has not interfered with free speech of the retired officers.

Mr. GALUSHA. The retired officers that I have talked to think it should be in there. They can go to any Army hospital and——

Senator SALTONSTALL. It is not merely keeping them in line.

Senator KEFAUVER. How about the Reserves?

Mr. GALUSHA. The retired Reserve?

Mr. LARKIN. The retired Reserve is not subject unless he is in the hospital, according to this scheme.

Professor MORGAN. Actually in the hospital.

Mr. LARKIN. That is No. 5.

Senator KEFAUVER. How about Colonel Maas?

Mr. LARKIN. His feeling was——

Senator KEFAUVER. What is he?

Mr. LARKIN. He is a Reserve.

Senator KEFAUVER. He thinks he cannot get out and criticize Congress.

Mr. LARKIN. Yes.

Senator KEFAUVER. Do you think he can?

Mr. GALUSHA. There is nothing stopping him.

Mr. LARKIN. I think he can unless he comes on inactive-training duty over the week, and got this voluntary order which he accepted.

Senator KEFAUVER. That is just that week end?

Mr. LARKIN. That is right. After that he can go and do as he pleases. Unless he had the written orders which said he was subject——

Senator KEFAUVER. He thinks he is subject.

Senator SALTONSTALL. Gen. Sherman Miles is a member of our State legislature, and as far as I know is receiving pay. He has been elected twice.

Senator KEFAUVER. Would it be satisfactory to ask Mr. Galusha to study this further with Professor Morgan and the Reserve Officers Association and see if we can alleviate some of their fears anyway?

Professor MORGAN. Senator, as far as I am concerned, you can cut down the military jurisdiction as much as you want to, except in this case where they are actually doing things that may really effect the service and/or civilians, this use of equipment, and so on and so forth; that is the only thing about that that I care about.

Senator KEFAUVER. If we could put in there that they should not be subjected to the code unless they are going to handle vehicles or airplanes and what not——

Mr. LARKIN. That, I think, is a good suggestion.

Senator KEFAUVER. That is just spelled out as to what the Army now does.

Mr. LARKIN. I think so. I think that would allay their fears. That is all that is intended.

The trouble springs from the fact that in here——

Senator KEFAUVER. What might be done.

Mr. LARKIN. This is not concrete and tangible enough.

Senator KEFAUVER. Suppose now—what is the article about criticizing Congress, 88?

Mr. LARKIN. Eighty-eight. Incidentally, it is Congress and not a Member of Congress.

Senator KEFAUVER. I do not know why Congress should be immune from criticism.

Mr. LARKIN. Article 88, page 70.

Senator KEFAUVER (reading):

Any officer who uses contemptuous or disrespectful words against the President, Vice President, Congress, Secretary of Defense, or a Secretary of a Department, a Governor or legislature of any State, Territory, or other possession of the United States in which he is on duty or present shall be punished as a court-martial may direct.

Well, that is pretty restrictive.

Senator SALTONSTALL. That is pretty restrictive.

Professor MORGAN. When we were talking about that I said that when I had the uniform on I wanted to crticize your predecessor in office.

Senator KEFAUVER. My feeling is that in the first place we ought to be able to criticize, and in the second place our greatest reservoir of men who may take part in public life, or should take part, would come from men who are officers, retired officers, or Reserve or what not.

Senator SALTONSTALL. Yes. On the other hand——

Senator KEFAUVER. That is my point.

Senator SALTONSTALL (continuing). The other side of it—I hate to see a fellow called out on Saturday night and say everything against his Government, and then on Monday morning he appears in uniform with a great smile on his face and squared-up shoulders.

Professor MORGAN. This is only for contemptuous language.

Senator KEFAUVER. What is disrespectful? What is some other adjective we could put in in place of "disrespectful"?

Mr. LARKIN. Contemptuous, vituperative.

Senator KEFAUVER. Does that not mean loud and noisy?

(Discussion off the record.)

Senator SALTONSTALL. Mr. Chairman, I would be perfectly glad to have them study this thing a little bit more, and see if we cannot work out any better language. My only feeling would be not to be too liberal with it. I agree with you.

Professor MORGAN. How much has it been used in the past? How many courts martial have you ever had?

Mr. LARKIN. I think practically never.

Professor MORGAN. Only in extreme cases.

Senator KEFAUVER. What have you got there?

Mr. LARKIN. The construction of what the language is supposed to mean is as follows:

This article covers both, (1) words which are disrespectful or contemptuous in themselves, such as abusive epithets, denunciatory or contemptuous expressions or intemperate or malevolent comments upon official or personal acts and, (2) words which are disrespectful or contemptuous because of the connection in which used and the surrounding circumstances. The person against whom the words are used must be occupying one of the offices named at the time of the offense. However, it is immaterial whether the words are spoken against him in his official or private capacity.

Then they state:

The language must be disrespectful or contemptuous—

which just keeps self-defining itself—

adverse criticism of the Government or President or Congress in the course of a political discussion, even though emphatically expressed, if not intended to be personally disrespectful, should not be charged as a violation of this article.

Similar expression of opinion made in a purely private conversation should

not ordinarily be made the basis for a court-martial charge. However, any written publications given broad circulation, or the utterance of disrespectful or contemptuous words in the presense of military inferiors would constitute an aggravation of the offense. Truth or falsity of the statements made is generally immaterial, since the gist of the offense is the contemptuous or disrespectful character of the language used.

Now, that is their construction.

Professor MORGAN. You can see that it would not be used often.

Mr. LARKIN. That is their interpretation of how it would be applied.

I assume that kind of a construction would appear again in the manual which must be written to implement this whole thing, you see.

Senator SALTONSTALL. Mr. Chairman, I would be glad to have Mr. Galusha go over this again with Mr. Morgan and yourself and submit anything, your final suggestions, to me. I would not oppose any change, but I would not make it to be confined too closely, that would be my opinion.

I have in mind that case just discussed, and I would move, Mr. Chairman, that we report the bill, subject to the improvements that we have discussed here this morning.

Senator KEFAUVER. Without objection that will be done. Thank you, sir.

Professor MORGAN. Thank you very much, Senator.

Senator KEFAUVER. We appreciate your coming, Professor Morgan.

I am informed that the Secretary of Defense will write a letter to the chairman of the Armed Services Committee, stating his position with regard to this legislation. When the letter is received it will be made a part of the record.

(The letter referred to is as follows:)

THE SECRETARY OF DEFENSE,
*Washington, June 8, 1949.*

HON. MILLARD E. TYDINGS,
*United States Senate*

DEAR SENATOR TYDINGS: As you know, I requested Prof. Edmund M. Morgan to inform your committee of my support of the Uniform Code of Military Justice when he appeared before you on my behalf.

I would appreciate it if this letter is incorporated in the record of your hearings and the committee report, because I am anxious to reiterate my strong support of the uniform code.

The code was drafted and transmitted to the Congress before I assumed office. I have taken the time, however, to familiarize myself with its principal provisions and I concur in Mr. Forrestal's opinion that the code represents an outstanding example of unification in the armed services. In my opinion, the code provides a number of very desirable protections for the accused without interfering with necessary military functions. In addition it represents a great advance in military justice in that it provides the same law and the same procedures for all persons in the armed forces. By its terms, the same rights, privileges, and obligations will apply to Army, Navy, Air Force, and Coast Guard. I cannot emphasize too much the importance of this equality and the fact that I believe it will be an item which will enhance the teamwork and cooperative spirit of the services.

I am aware of the conscientious and objective work of your committee and the House committee. I know that the bill has been improved by these constructive efforts and I wish to express to you and the members of your committee my deep appreciation. In order that the benefits of the code may be available at the earliest possible time, I strongly urge its passage at the present session of the Congress.

With kindest personal regards, I am,
Sincerely yours,

LOUIS JOHNSON.

Senator KEFAUVER. I also suggest that the three charts submitted by the National Defense Establishment, which indicate graphically (1) appellate review of Army and Air Force general court-martial cases, (2) present naval general court-martial procedures, (3) Uniform Code of Military Justice general court-martial review, be included in the record at this point.

(The material referred faces this page.)

(Whereupon, at 12:10 p. m., the subcommittee adjourned.)

# APPELLATE REVIEW OF ARMY AND AIR FORCE GENERAL COURT-MARTIAL CASES

## AND SPECIAL COURT-MARTIAL CASES INVOLVING A BAD CONDUCT DISCHARGE

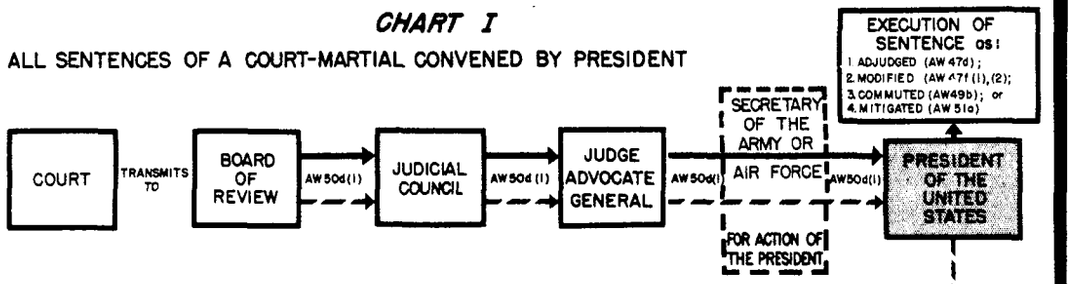
UNDER THE 1948 ARTICLES OF WAR

### LEGEND –

- LEGALLY SUFFICIENT
- LEGALLY SUFFICIENT BUT MODIFICATION OR CONFIRMING ACTION BY JUDICIAL COUNCIL DEEMED NECESSARY BY BOARD OF REVIEW OR JAG
- NOT LEGALLY SUFFICIENT OR ERRORS AND IRREGULARITIES
- AUTHORITY HAVING CLEMENCY POWERS

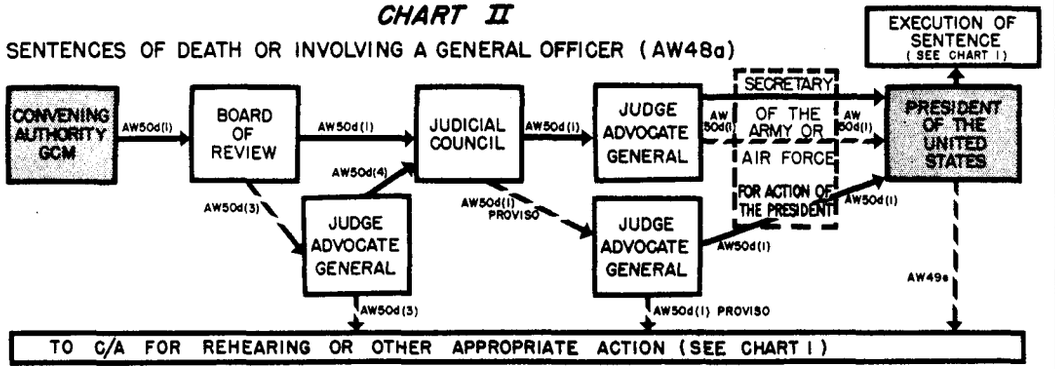
### CHART I

ALL SENTENCES OF A COURT-MARTIAL CONVENED BY PRESIDENT




### CHART II

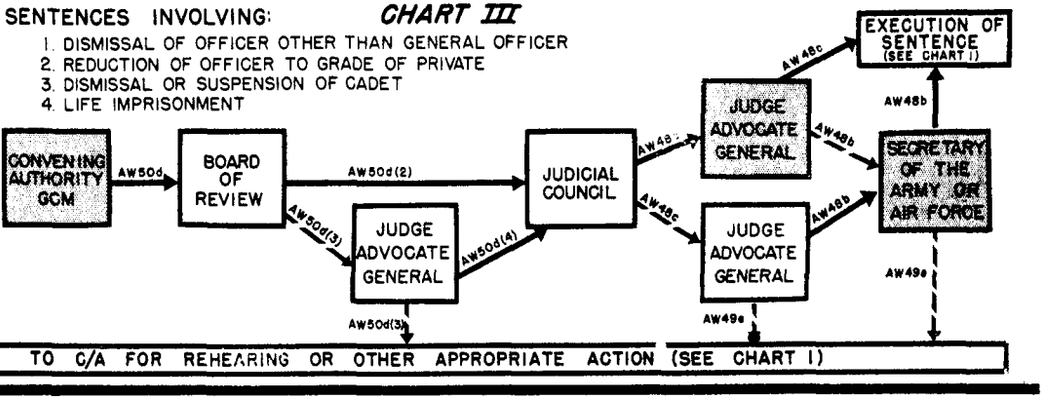
SENTENCES OF DEATH OR INVOLVING A GENERAL OFFICER (AW48a)




### CHART III

SENTENCES INVOLVING:

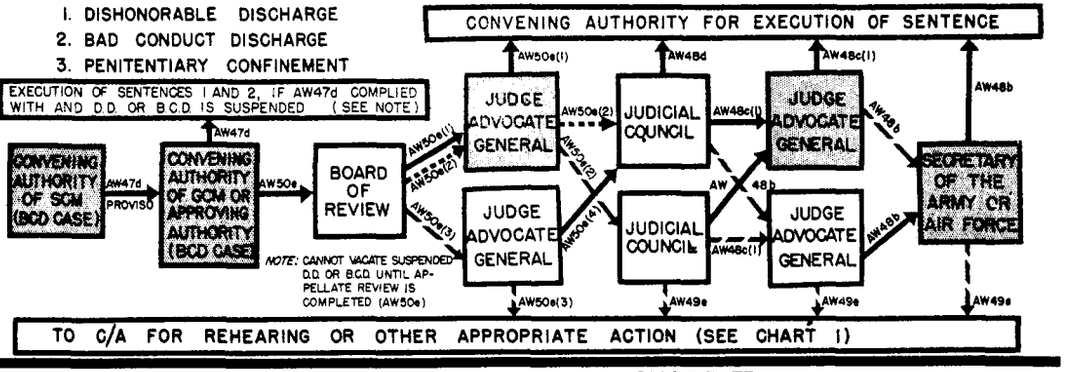
1. DISMISSAL OF OFFICER OTHER THAN GENERAL OFFICER
2. REDUCTION OF OFFICER TO GRADE OF PRIVATE
3. DISMISSAL OR SUSPENSION OF CADET
4. LIFE IMPRISONMENT




### CHART IV

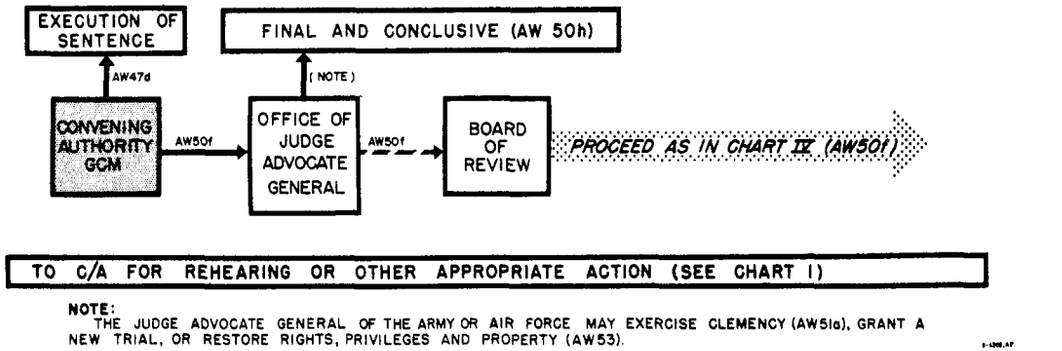
SENTENCES INVOLVING:

1. DISHONORABLE DISCHARGE
2. BAD CONDUCT DISCHARGE
3. PENITENTIARY CONFINEMENT




### CHART V

ALL OTHER GENERAL COURT-MARTIAL CASES




NOTE:
THE JUDGE ADVOCATE GENERAL OF THE ARMY OR AIR FORCE MAY EXERCISE CLEMENCY (AW51a), GRANT A NEW TRIAL, OR RESTORE RIGHTS, PRIVILEGES AND PROPERTY (AW53).

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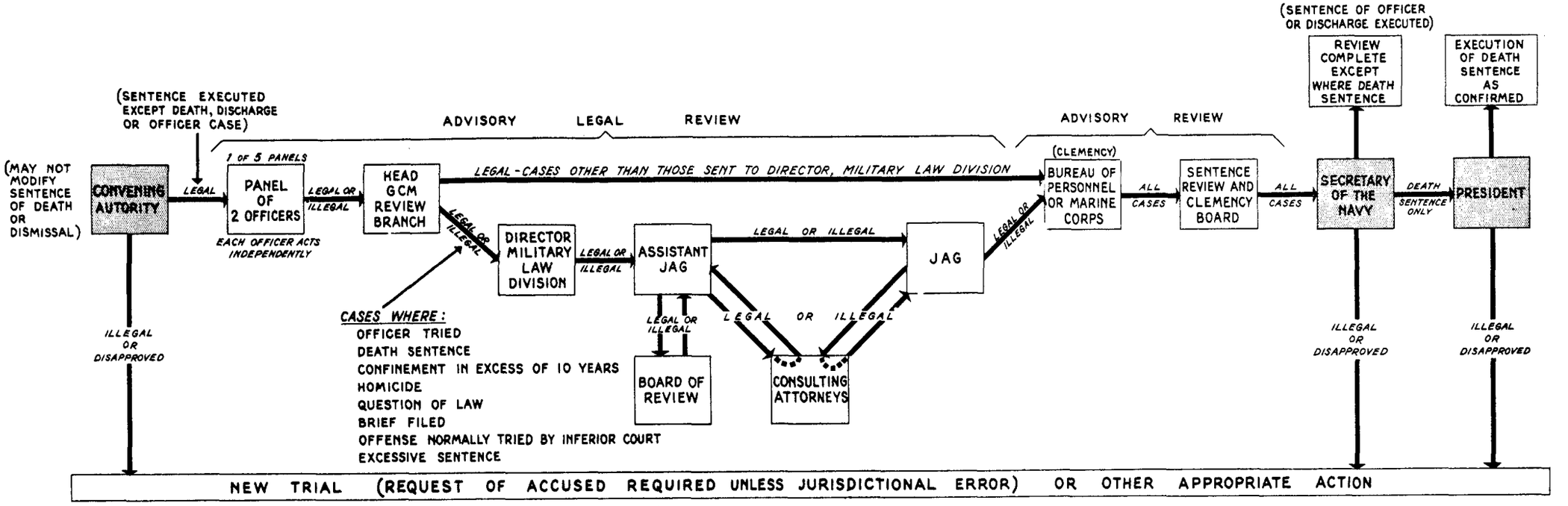
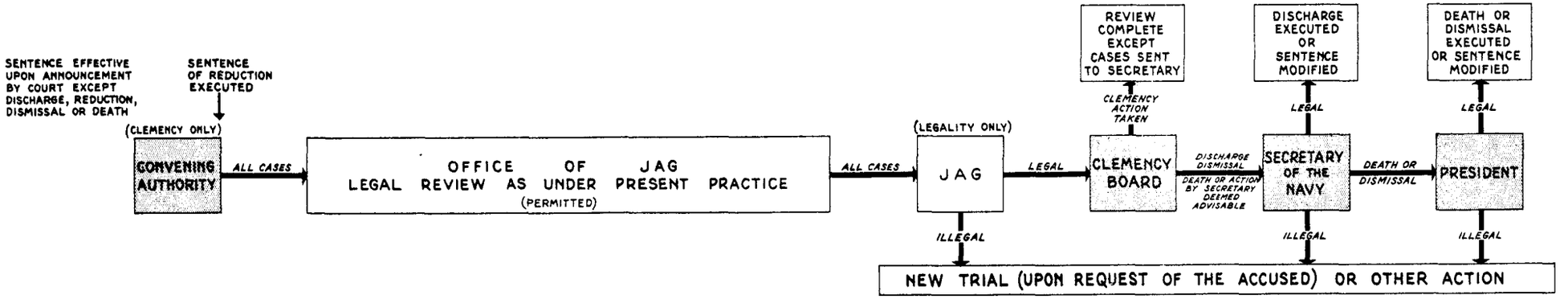
# I. PRESENT NAVAL GENERAL COURT-MARTIAL REVIEW PROCEDURE




Notes: Power to confirm dismissal has been delegated by President to Secretary of the Navy.
Shaded squares denote authorities with power to modify sentence regardless of legality.

# II. REVIEW OF NAVY GENERAL COURTS-MARTIAL UNDER PROPOSED AGN (S. 1338)

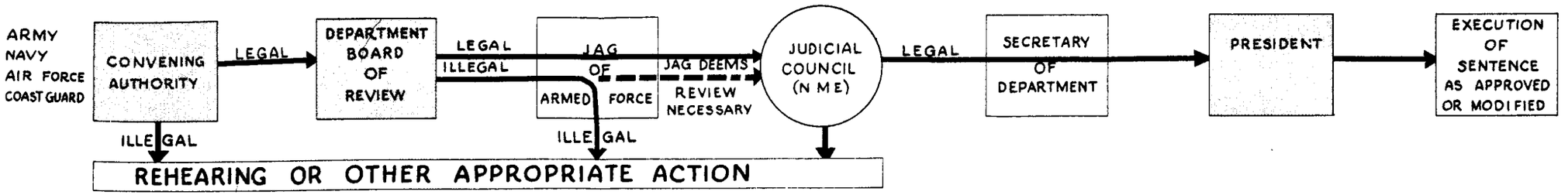



Notes: Power to confirm dismissal may be delegated to Secretary of the Navy.
Shaded squares denote authorities with power to modify sentence regardless of legality.
Additional review by Board of Appeals upon petition of the accused within one year.

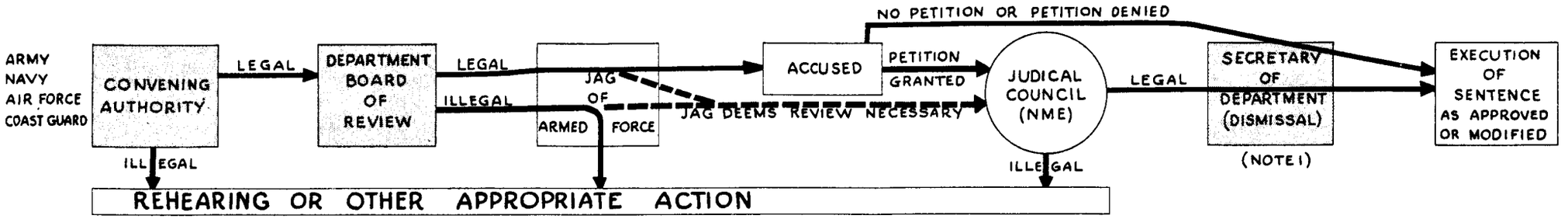
# UNIFORM CODE OF MILITARY JUSTICE

# GENERAL COURT — MARTIAL REVIEW

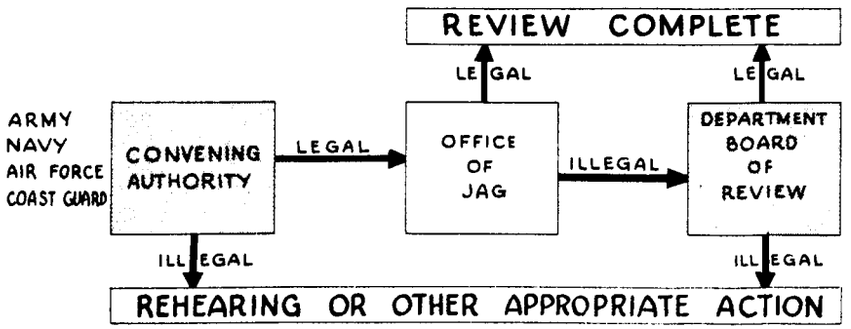
## I. SENTENCES OF DEATH OR INVOLVING GENERAL OR FLAG OFFICER




## II. SENTENCES EXTENDING TO DISMISSAL, DISCHARGE, OR CONFINEMENT IN EXCESS OF ONE YEAR.




## III. OTHER GENERAL COURT-MARTIAL SENTENCES.




NOTES:

1. Secretary of Department must approve dismissal before execution and also controls residual clemency.
2. Shaded squares denote authorities with power to modify the sentence.